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IN THE

Supreme Court of the United States

Misc. No. 239

KOKI HIROTA, a citizen and national of Japan, appearing by his attorney and next friend, David F. Smith,

Petitioner,

vs.

1. General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers. 2. Lieut. General Walton H. Walker, individually and as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan. 3. James V. Forrestal, individually and as Secretary of National Defense of the United States, and 4. Kenneth C. Royall, individually and as Secretary, Department of the Army of the United States,

Defendants.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS, PETITION FOR WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION

DAVID F. SMITH,
Attorney for Petitioner.

WILLIAM LOGAN, JR.,
JOHN G. BRANNON,
GEORGE YAMAOKA,
Of Counsel.

JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084 5 0 [illegible] 152

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Petitioner,

vs.

General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers; *et al.*,

Defendants.

Motion for Leave to File Annexed Petition for a Writ of Habeas Corpus on Behalf of Koki Hirota

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

And now comes the Petitioner, KOKI HIROTA, by his attorney and next friend, DAVID F. SMITH, and moves this Honorable Court to enter an order allowing the annexed Petition for a Writ of Habeas Corpu. on behalf of KOKI HIROTA to be filed and prosecuted.

KOKI HIROTA, by
DAVID F. SMITH,
His Attorney and Next Friend.

DAVID F. SMITH,
Attorney for Petitioner.

Petition for Writ of Habeas Corpus

IN THE

SUPREME COURT OF THE UNITED STATES

Misc. No. 239

KOKI HIROTA, a citizen and national of Japan, appearing by his attorney and next friend, David F. Smith,

Petitioner,

vs.

1. General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers. 2. Lieut. General Walton H. Walker, individually and as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan. 3. James V. Forrestal, individually and as Secretary of National Defense of the United States, and 4. Kenneth C. Royall, individually and as Secretary, Department of the Army of the United States,

Defendants.

The Petition of KOKI HIROTA, a citizen and national of Japan, respectfully represents to the Honorable, the Supreme Court of the United States the following:

1. The Defendant, General of the Army Douglas MacArthur is a citizen of the United States, and is sued individually and as General of the Army of the United States in the Military Occupied Territory of Japan and in his capacity as Supreme Commander for the Allied Powers and also as the person who has the efficient custody and control of the Petitioner.

2. The Defendant, Lieut. General Walton H. Walker is a citizen of the United States, and is sued individually

and as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan and as the person who has the immediate physical custody of the Petitioner.

3. The Defendant, James V. Forrestal, is a citizen of the United States and is sued herein individually and as Secretary of National Defense of the United States and as the person who has the power to command the Defendants, General of the Army Douglas MacArthur and Lieut. General Walton H. Walker.

4. The Defendant, Kenneth C. Royall is a citizen of the United States and is sued herein individually and as Secretary of the Department of the Army of the United States and also as the person who has the efficient power to control the official acts of General of the Army Douglas MacArthur and Lieut. General Walton H. Walker.

5. Petitioner was arrested and taken into custody upon an order issued by the Commanding General of the United States 8th Army of Japan, and confined to Sugamo Prison in Tokyo, Japan, in the latter part of 1945, and the Petitioner has been detained in said prison ever since.

6. Petitioner alleges that he has been unlawfully imprisoned and restrained of his liberty continuously since the latter part of 1945 by reason of illegal actions taken by the Defendants herein, all of which will more specifically appear hereafter.

7. The Petitioner has always been a career diplomat. He has never held any military office or position at any time. He served as Foreign Minister of the Japanese Empire from September, 1933, until March, 1936, when he became Prime Minister. From the fall of his cabi-

net in February, 1937, for four months he held no public office. He was Foreign Minister again in the first Konoye Cabinet until May 10, 1938, at which time he resigned his last public office and retired to private life. He had no connection with the Pacific war proper or anything which transpired in connection with the Japanese prosecution of that war. The petitioner, together with other former Prime Ministers of Japan, was called before the Emperor of Japan on November 29, 1941, to express his opinion as a senior statesman of Japan with respect to the position of the Tojo Government that the Pacific war was "inevitable" from the standpoint of the national defense of Japan and on that occasion he expressed a dissuading point of view with respect to the Japanese participation in the Pacific war proper.

8. On December 1, 1943, the United States of America, the Republic of China, and the United Kingdom, by the executive heads of their respective Governments, proclaimed as follows:

"THE CAIRO CONFERENCE

UNITED STATES OF AMERICA: PRESIDENT ROOSEVELT
CHINA: GENERALISSIMO CHIANG KAI-SHEK
UNITED KINGDOM: PRIME MINISTER CHURCHILL

Statement Released December 1, 1943

"The several military missions have agreed upon future military operations against Japan. The Three Great Allies expressed their resolve to bring unrelenting pressure against their brutal enemies by sea, land, and air. This pressure is already rising.

"The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. They covet no gain for themselves and have no thought of territorial expansion. It is their purpose that Japan

shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent.

"With these objects in view the three Allies, in harmony with those of the United Nations at war with Japan, will continue to persevere in the serious and prolonged operations necessary to procure the unconditional surrender of Japan."

9. On July 26, 1945, a proclamation was issued by the executive heads of the Governments of the United States, United Kingdom, and China, known as the Potsdam Declaration, which reads as follows:

"POTSDAM DECLARATION

PROCLAMATION BY HEADS OF GOVERNMENTS, UNITED STATES, UNITED KINGDOM, AND CHINA

"(1) We—the President of the United States, the President of the National Government of the Republic of China, and the Prime Minister of Great Britain, representing the hundreds of millions of our countrymen, have conferred and agree that Japan shall be given an opportunity to end this war.

"(2) The prodigious land, sea and air forces of the United States, the British Empire and of China, many times reinforced by their armies and air fleets from the west, are poised to strike the final blows upon Japan. This military power is sustained and inspired by the determination of all the Allied Nations to prosecute the war against Japan until she ceases to resist.

"(3) The result of the futile and senseless German resistence to the might of the aroused free peoples of the world stands forth in awful clarity as an example to the people of Japan. The might that now converges on Japan is immeasurably greater than that which, when applied to the resisting Nazis, necessarily laid waste to the lands, the industry and the method of life of the whole German people. The full application of our military power, backed by our resolve, *will* mean the inevitable and complete destruction of the Japanese armed forces and just as inevitably the utter devastation of the Japanese homeland.

"(4) The time has come for Japan to decide whether she will continue to be controlled by those self-willed militaristic advisers whose unintelligent calculations have brought the Empire of Japan to the threshold of annihilation, or whether she will follow the path of reason.

"(5) *Following are our terms.* We will not deviate from them. There are no alternatives. We shall brook no delay.

"(6) There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.

"(7) Until such a new order is established *and* until there is convincing proof that Japan's war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objectives we are here setting forth.

"(8) The terms of the Cairo Declaration shall be carried out and Japanese sovereignity shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.

"(9) The Japanese military forces, after being completely disarmed, shall be permitted to return to

their homes with the opportunity to lead peaceful and productive lives.

"(10) We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including whose who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights, shall be established.

"(11) Japan shall be permitted to maintain such industries as will sustain her economy and permit the exaction of just reparations in kind, but not those which would enable her to re-arm for war. To this end, access to, as distinguished from control of, raw materials shall be permitted. Eventual Japanese participation in world trade relations shall be permitted.

"(12) The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished and there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government.

"(13) We call upon the government of Japan to proclaim now the unconditional surrender of all Japanese armed forces, and to provide proper and adequate assurances of their good faith in such action. The alternative for Japan is prompt and utter destruction."

10. On September 2, 1945, on board the *SS Missouri* an instrument of surrender on behalf of the Japanese Empire was signed, which reads as follows:

"INSTRUMENT OF SURRENDER

"We, acting by command of and in behalf of the Emperor of Japan, the Japanese Government and the Japanese Imperial General Headquarters, hereby ac-

cept the provisions set forth in the declaration issued by the heads of the Governments of the United States, China and Great Britain on 26 July 1945 at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics, which four powers are hereafter referred to as the Allied Powers.

"We hereby proclaim the unconditional surrender to the Allied Powers of the Japanese Imperial General Headquarters and of all Japanese armed forces and all armed forces under Japanese control wherever situated.

"We hereby command all Japanese forces wherever situated and the Japanese people to cease hostilities forthwith, to preserve and save from damage all ships, aircraft, and military and civil property and to comply with all requirements which may be imposed by the Supreme Commander for the Allied Powers or by agencies of the Japanese Government at his direction.

"We hereby command the Japanese Imperial General Headquarters to issue at once orders to the Commanders of all Japanese forces and all forces under Japanese control wherever situated to surrender unconditionally themselves and all forces under their control.

"We hereby command all civil, military and naval officials to obey and enforce all proclamations, orders and directives deemed by the Supreme Commander for the Allied Powers to be proper to effectuate this surrender and issued by him or under his authority and we direct all such officials to remain at their posts and to continue to perform their non-combatant duties unless specifically relieved by him or under his authority.

"We hereby undertake for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever action may be required by the Supreme Commander for the Allied Powers or by any other designated representa-

tive of the Allied Powers for the purpose of giving effect to that Declaration.

"We hereby command the Japanese Imperial Government and the Japanese Imperial General Headquarters at once to liberate all allied prisoners of war and civilian internees now under Japanese control and to provide for their protection, care, maintenance and immediate transportation to places as directed.

"The authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender.

"Signed at Tokyo Bay, Japan, at 0904 on the Second day of September, 1945.

"MAMORU SHIGEMITSU
By Command and in behalf of the Emperor of Japan and the Japanese Government.

YOSHIJIRO AMEZU
By Command and in behalf of the Japanese Imperial General Headquarters.

"Accepted at Tokyo Bay, Japan at 0908 on the Second day of September, 1945, for the United States, Republic of China, United Kingdom and the Union of Soviet Socialist Republics, and in the interests of the other United Nations at war with Japan.

DOUGLAS MACARTHUR
Supreme Commander for the Allied Powers

"C. W. NIMITZ
United States
Representative

T. A. BLAMEY
Commonwealth of
Australia
Representative

HSU YUNG-CHANG
Republic of China
Representative

L. MOORE COSGRAVE
Dominion of Canada
Representative

BRUCE FRASER
United Kingdom
Representative

LE CLERC
Provisional Government of
the French Republic
Representative

LIEUTENANT GENERAL
K. DEREVYANKO
Union of Soviet
Socialist Republics
Representative

C. E. L. HELFRICH
Kingdom of the Netherlands
Representative

LEONARD M. ISITT
Dominion of New Zealand Representative"

1. On September 2, 1945, the following proclamation was issued by the Emperor of Japan:

"PROCLAMATION BY THE EMPEROR OF JAPAN

"Accepting the terms set forth in the Declaration issued by the heads of the Governments of the United

States, Great Britain and China on July 26, 1945, at Potsdam and subsequently adhered to by the Union of Soviet Socialist Republics, I have commanded the Japanese Imperial Government and the Japanese Imperial General Headquarters to sign on my behalf the instrument of surrender presented by the Supreme Commander for the Allied Powers and to issue General Orders to the Military and Naval forces in accordance with the direction of the Supreme Commander for the Allied Powers. I command all my people forthwith to cease hostilities, to lay down their arms and faithfully to carry out all the provisions of the instrument of surrender and the General Orders issued by the Japanese Imperial General Headquarters thereunder."

12. On January 19, 1946, the Defendant General of the Army Douglas MacArthur, acting in his capacity as General of the Army of the United States and Supreme Commander for the Allied Powers, issued a special proclamation at Tokyo, Japan, for the establishment of an International Military Tribunal for the Far East, which reads as follows:

"SPECIAL PROCLAMATION

ESTABLISHMENT OF AN INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

"WHEREAS, the United States and the Nations allied therewith in opposing the illegal wars of aggression of the Axis Nations, have from time to time made declarations of their intentions that war criminals should be brought to justice;

"WHEREAS, the Governments of the Allied Powers at war with Japan on the 26th July 1945 at Potsdam, declared as one of the terms of surrender that stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners;

"WHEREAS, by the Instrument of Surrender of Japan executed at Tokyo Bay, Japan, on the 2nd September 1945, the signatories for Japan, by command of and in behalf of the Emperor and the Japanese Government accepted the terms set forth in such Declaration at Potsdam;

"WHEREAS, by such Instrument of Surrender, the authority of the Emperor and the Japanese Government to rule the state of Japan is made subject to the Supreme Commander for the Allied Powers, who is authorized to take such steps as he deems proper to effectuate the terms of surrender;

"WHEREAS, the undersigned has been designated by the Allied Powers as Supreme Commander for the Allied Powers to carry into effect the general surrender of the Japanese armed forces;

"WHEREAS, the Governments of the United States, Great Britain and Russia at the Moscow Conference, 26th December 1945, having considered the effectuation by Japan of the Terms of Surrender, with the concurrence of China have agreed that the Supreme Commander shall issue all Orders for the implementation of the Terms of Surrender.

"NOW, THEREFORE, I, Douglas MacArthur, as Supreme Commander for the Allied Powers, by virtue of the authority so conferred upon me, in order to implement the Term of Surrender which requires the meting out of stern justice toward criminals, do order and provide as follows:

"ARTICLE 1. There shall be established an International Military Tribunal for the Far East for the trial of those persons charged individually, or as members of organizations, or in both capacities, with offenses which include crimes against peace.

"ARTICLE 2. The Constitution, jurisdiction and functions of this Tribunal are those set forth in the Charter of the International Military Tribunal for the Far East, approved by me this day.

"ARTICLE 3. Nothing in this Order shall prejudice the jurisdiction of any other international, national or occupation court, commission or other tribunal established or to be established in Japan or in any territory of a United Nation with which Japan has been at war, for the trial of war criminals.

"Given under my hand at Tokyo, this 19th day of January, 1946.

DOUGLAS MACARTHUR,
General of the Army, United States Army
Supreme Commander for the Allied Powers."

13. On April 26, 1946, General of the Army Douglas MacArthur issued General Orders No. 20, amending General Orders No. 1, which promulgated the Charter of the International Military Tribunal for the Far East as follows:

"GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS

APO 500
26 April 1946

GENERAL ORDERS
No. 20

"General Orders No. 1, General Headquarters, Supreme Commander for the Allied Powers, 19 January 1946, subject as below, is superseded. The Charter of the International Military Tribunal for the Far East established by Proclamation of the Supreme Commander for the Allied Powers, 19 January 1946, is amended, and as amended, reads as follows:

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

SECTION I

CONSTITUTION OF TRIBUNAL

"ARTICLE 1. *Tribunal Established.* The International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo.

"ARTICLE 2. *Members.* The Tribunal shall consist of not less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines.

"ARTICLE 3. *Officers and Secretariat.*

"a. *President.* The Supreme Commander for the Allied Powers shall appoint a Member to be President of the Tribunal.

"b. *Secretariat.*

"(1) The Secretariat of the Tribunal shall be composed of a general Secretary to be appointed by the Supreme Commander for the Allied Powers and such assistant secretaries, clerks, interpreters, and other personnel as may be necessary.

"(2) The General Secretary shall organize and direct the work of the Secretariat.

"(3) The Secretariat shall receive all documents addressed to the Tribunal, maintain the records of the Tribunal, provide necessary clerical services to the Tribunal and its members, and perform such other duties as may be designated by the Tribunal.

"ARTICLE 4. *Convening and Quorum, Voting and Absence.*

"a. *Convening and Quorum.* When as many as six members of the Tribunal are present, they may convene the Tribunal in formal session. The presence of a majority of all members shall be necessary to constitute a quorum.

"b. *Voting.* All decisions and judgments of this Tribunal, including convictions and sentences, shall be by a majority vote of those members of the Tribunal present. In case the votes are evenly divided, the vote of the President shall be decisive.

"c. *Absence.* If a member at any time is absent and afterwards is able to be present, he shall take part in all subsequent proceedings; unless he declares in open court that he is disqualified by reason of insufficient familiarity with the proceedings which took place in his absence.

"SECTION II

JURISDICTION AND GENERAL PROVISIONS

"ARTICLE 5. *Jurisdiction Over Persons and Offenses.* The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

"a. *Crimes against Peace:* Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

"b. *Conventional War Crimes*: Namely, violations of the laws or customs of war;

"c. *Crimes against Humanity*: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or prosecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

"ARTICLE 6. *Responsibility of Accused.* Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior, shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

"ARTICLE 7. *Rules of Procedure.* The Tribunal may draft and amend rules of procedure consistent with the fundamental provisions of this Charter.

"ARTICLE 8. *Counsel.*

"a. *Chief of Counsel.* The Chief of Counsel designated by the Supreme Commander for the Allied Powers is responsible for the investigation and prosecution of charges against war criminals within the jurisdiction of this Tribunal and will render such legal assistance to the Supreme Commander as is appropriate.

"b. *Associate Counsel.* Any United Nation with which Japan has been at war may appoint an Associate Counsel to assist the Chief of Counsel.

"SECTION III

"FAIR TRIAL FOR ACCUSED

"ARTICLE 9. *Procedure for Fair Trial.* In order to insure fair trial for the accused the following procedure shall be followed:

"a. *Indictment.* The indictment shall consist of a plain, concise, and adequate statement of each offense charged. Each accused shall be furnished, in adequate time for defense, a copy of the indictment, including any amendment, and of this Charter, in a language understood by the accused.

"b. Language. The trial and related proceedings shall be conducted in English and in the language of the accused. Translations of documents and other papers shall be provided as needed and requested.

"c. *Counsel for Accused.* Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial.

"d. *Evidence for Defense.* An accused shall have the right, through himself or through his counsel (but not through both), to conduct his defense, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine.

"e. *Production of Evidence for the Defense.* An accused may apply in writing to the Tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located. It shall also state the facts proposed to be proved by the witness or the document

and the relevancy of such facts to the defense. If the Tribunal grants the application the Tribunal shall be given such aid in obtainng production of the evidence as the circumstances require.

"ARTICLE 10. *Applications and Motions before Trial.* All motions, applications, or other requests addressed to the Tribunal prior to the commencement of trial shall be made in writing and filed with the General Secretary of the Tribunal for action by the Tribunal.

SECTION IV

POWERS OF TRIBUNAL AND CONDUCT OF TRIAL

"ARTICLE 11. *Powers.* The Tribunal shall have the power:

"a. To summon witnesses to the trial, to require them to attend and testify, and to question them.

"b. To interrogate each accused and to permit comment on his refusal to answer any question.

"c. To require the production of documents and other evidentiary material.

"d. To require of each witness an oath, affirmation, or such declaration as is customary in the country of the witness, and to administer oaths.

"e. To appoint officers for the carrying out of any task designated by the Tribunal, including the power to have evidence taken on commission.

"ARTICLE 12. *Conduct of Trial.* The Tribunal shall:

"a. Confine the trial strictly to an expeditious hearing of the issues raised by the charges.

"b. Take strict measures to prevent any action which would cause any unreasonable delay and rule out

irrelevant issues and statements of any kind whatsoever.

"c. Provide for the maintenance of order at the trial and deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any accused or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

"d. Determine the mental and physical capacity of any accused to proceed to trial.

"ARTICLE 13. *Evidence.*

"a. *Admissibility.* The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible.

"b. *Relevance.* The Tribunal may require to be informed of the nature of any evidence before it is offered in order to rule upon the relevance.

"c. *Specific evidence admissible.* In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

"(1) A document, regardless of its security classification and without proof of its issuance or signature, which appears to the Tribunal to have been signed or issued by any officer, department, agency or member of the armed forces of any government.

"(2) A report which appears to the Tribunal to have been signed or issued by the International Red Cross or a member thereof, or by a doctor of medicine or any medical service personnel, or by an investigator or intelligence officer, or by

any other person who appears to the Tribunal to have personal knowledge of the matters contained in the report.

"(3) An affidavit, deposition or other signed statement.

"(4) A diary, letter or other document, including sworn or unsworn statements, which appear to the Tribunal to contain information relating to the charge.

"(5) A copy of a document or other secondary evidence of its contents, if the original is not immediately available.

"d. *Judicial Notice.* The Tribunal shall neither require proof of facts of common knowledge, nor of the authenticity of official government documents and reports of any nation nor of the proceedings, records, and findings of military or other agencies of any of the United Nations.

"e. *Records, Exhibits, and Documents.* The transcript of the proceedings, and exhibits and documents submitted to the Tribunal, will be filed with the General Secretary of the Tribunal and will constitute part of the Record.

"ARTICLE 14. *Place of Trial.* The first trial will be held at Tokyo, and any subsequent trials will be held at such places as the Tribunal decides.

"ARTICLE 15. *Course of Trial Proceedings.* The proceedings at the Trial will take the following course:

"a. The indictment will be read in court unless the reading is waived by all accused.

"b. The Tribunal will ask each accused whether he pleads 'guilty' or 'not guilty.'

"c. The prosecution and each accused (by counsel only, if represented) may make a concise opening statement.

"d. The prosecution and defense may offer evidence, and the admissibility of the same shall be determined by the Tribunal.

"e. The prosecution and each accused (by counsel only, if represented) may examine each witness and each accused who gives testimony.

"f. Accused (by counsel only, if represented) may address the Tribunal.

"g. The prosecution may address the Tribunal.

"h. The Tribunal will deliver judgment and pronounce sentence.

"SECTION V

JUDGMENT AND SENTENCE

"ARTICLE 16. *Penalty.* The Tribunal shall have the power to impose upon an accused, on conviction, death, or such other punishment as shall be determined by it to be just.

"ARTICLE 17. *Judgment and Review.* The judgment will be announced in open court and will give the reasons on which it is based. The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action. Sentence will be carried out in accordance with the Order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence, except to increase its severity.

"By command of General MACARTHUR:

"RICHARD J. MARSHALL
Major General, General Staff Corps,
Chief of Staff

OFFICIAL:

/s/ B. M. Fitch
B. M. FITCH"

14. On February 15, 1946, General of the Army Douglas MacArthur, acting on behalf of 11 governments comprising the Allied Powers, including the Government of the United States of America, appointed nominees of each of the Allied Powers to act as judges on the International Military Tribunal for the Far East, and in a trial thereafter conducted by said Tribunal, as hereinafter set forth, General of the Army Douglas MacArthur substituted a second nominee of the United States after the trial had been in progress approximately three months.

15. The International Military Tribunal for the Far East conducted a trial under an indictment returned pursuant to the terms of the aforesaid charter, to which indictment the Petitioner pleaded not guilty. The Tribunal took evidence for a period of nearly two years, and on November 12, 1948, the Tribunal, by a majority finding and judgment, found the Petitioner guilty of participating "in the common plan of conspiracy to wage aggressive wars against China," and found the Petitioner guilty under Counts 1 and 27 of the indictment. The Tribunal also found the Petitioner guilty under Count 55 of the indictment in connection with an alleged dereliction of duty solely in connection with the so-called "Rape of Nanking" which occurred in December 1937 and January 1938, at which time the Petitioner was the Foreign Minister of Japan. The Petitioner received protests from foreign powers in connection with the alleged incident at Nanking and, as all the evidence before the Tribunal showed, promptly transmitted the protests to the Army, personally protested with respect to the alleged behavior of the Army, and otherwise fully discharged his duty as Foreign Minister. As there was no declaration of

war on the part of the Nationalist Regime Government of China or on the part of Japan until December 8, 1941, at which time the Nationalist Government of China declared war on Japan, this Petitioner was convicted under all three previously mentioned counts for acts and omissions which had no relation whatever to the Pacific war proper.

The Petitioner is informed that three of the eleven judges of the Tribunal representing India, the Netherlands, and France voted to acquit the Petitioner upon all three counts upon which he was convicted. Five of the eleven judges of the Tribunal representing India, the Netherlands, France, the Soviet Union and Australia expressed the view, as Petitioner is informed, that the death sentence imposed upon the Petitioner was too drastic and severe. The counts upon which the Petitioner was convicted read as follows:

"Count 1

"All the accused together with other persons, between the 1st January, 1928, and the 2nd September, 1945, participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy, and are responsible for all acts performed by any person in execution of such plan:

"The object of such plan or conspiracy was that Japan should secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and of all countries bordering thereon and islands therein, and for that purpose they conspired that Japan should alone or in combination with other countries having similar objects, or who could be induced or coerced to join therein, wage declared or undeclared war or wars of aggression, and war or wars in violation of international law, treaties,

agreements and assurances, against any country or countries which might oppose that purpose.

"The whole of the Particulars in Appendix A, of the Treaty Articles in Appendix B, and of the Assurances in Appendix C, relate to this Count."

"Count 27

"All the accused, between the 18th September, 1931, and the 2nd September, 1945, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Republic of China.

"The same Particulars, Treaty Articles and Assurances as in Count 2, relate to this Count."

"Count 55

"The accused DOHIHARA, HATA, HOSHINO, ITAGAKI, KAYA, KIDO, KIMURA, KOISO, MUTO, NAGANO, OKA, OSHIMA, SATO, SHIGEMITSU, SHIMADA, SUZUKI, TOGO, TOJO and UMEZU, between the 7th December, 1941, and the 2nd September, 1945, being by virtue of their respective offices responsible for securing the observance of the said Conventions and assurances and the Laws and Customs of War in respect of the armed forces in the countries hereinafter named and in respect of many thousands of prisoners of war and civilians then in the power of Japan belonging to the United States of America, the British Commonwealth of Nations, the Republic of France, the Kingdom of the Netherlands, the Commonwealth of the Philippines, the Republic of China, the Republic of Portugal and the Union of Soviet Socialist Republics, deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war.

"In the case of the Republic of China, the said offense began on the 18th September, 1931, and the

following accused were responsible for the same in addition to those named above: ARAKI, HASHIMOTO, HIRANUMA, HIROTA, MATSUI, MATSUOKA, MINAMI."

16. Pursuant to the finding and judgment of guilt by the International Military Tribunal of the Far East under the aforesaid counts indictment, the Tribunal sentenced the Petitioner to be hanged. Thereafter, within the period of one week allowed for an appeal by General of the Army Douglas MacArthur, Petitioner did appeal citing various errors committed by the Tribunal during the course and proceedings of the trial.

17. On or about November 23, 1948 the Defendant, General of the Army Douglas MacArthur denied the appeal of the Petitioner and issued an order commanding the Defendant, Lieut. General Walton H. Walker as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan, to carry out at an undisclosed time the death sentence as "pronounced by the Tribunal" as the same was approved and affirmed by General of the Army Douglas MacArthur and Supreme Commander for the Allied Powers. Petitioner alleges that he will be executed instanter unless afforded immediate relief by this Honorable Court.

18. The Petitioner alleges that this Honorable Court has jurisdiction to issue the writ of Habeas Corpus requested herein and grant the relief sought under §§ 451 to 462, inclusive, of Title 28 of the United States Code; under the constitution, treaties, international engagements and laws of the United States of America. The Petitioner is presently in custody under and by color

of the authority of the United States, is in custody in violation of the constitution, treaties, international engagements and laws of the United States, is in custody for acts done or omitted under a right, title, authority, privilege, protection, and the exemption which he claims under the commission, order, or sanction of the Japanese Government by reason of having done the alleged acts for which he was convicted while serving as quasi-head of the Japanese Government in the capacity of Prime Minister and Foreign Minister, the validity and effect whereof depend upon the law of nations.

19. Petitioner alleges that General of the Army Douglas MacArthur, as a citizen of the United States, acting either in his capacity as a General of the Army of the United States or as Supreme Commander for the Allied Powers, had no authority at any time from the Congress or the President of the United States to create the International Military Tribunal for the Far East or to issue a special charter for the government and procedure of said Tribunal; and his action in that respect has never been ratified; that nothing contained in the Potsdam Declaration or the Japanese instrument of surrender of September 2, 1945, or anything done by way of "implementation" of the Japanese instrument of surrender, furnished any lawful basis for the creation of an International Military Tribunal for the trial of "crimes against peace," "crimes against humanity," and "conspiracy to commit crimes against peace and against humanity"; or for the trial of "conventional war crimes in violation of the customs and usage of war," in any court other than a national court or commission.

General of the Army Douglas MacArthur has not heretofore been authorized by any law enacted by the Congress of the United States of America or any provision of its Constitution to establish a Military Tribunal for the trial of war criminals other than an American Military Tribunal or commission; nor has the Congress of the United States of America authorized him to appoint American or Philippine civilian or military judges to an International Military Court or to associate or pool or commingle American interests and powers in such a Tribunal; nor has the Congress of the United States ever authorized or empowered him to accept an appointment or office or place of trust from sovereign foreign nations for the purpose of establishing an International Military Tribunal or to appoint either civilian or military judges of those foreign nations to such Tribunal; that the powers resting in General of the Army Douglas MacArthur, as Supreme Commander for the Allied Powers, are confined to the Military Occupation of Japan, the coordination of such operations, maintenance of the security of the occupation, including the power to appoint only an American Military Tribunal or commission for the trial of conventional war crimes, as the same have been heretofore defined in the customs and usages of war and in the Articles of War enacted by the Congress of the United States.

The action of General of the Army Douglas MacArthur, in accepting an office, title and place of trust from ten (10) foreign governments without consent of the Congress of the United States of America for this purpose, and undertaking to appoint civil and military judges to sit in an International Military Tribunal to represent such foreign governments and the United States,

and his reservation of sole right to review, approve, reverse or modify the final decision of such Tribunal on behalf of eleven governments, which decision of the Tribunal was purely advisory, was and is in violation of Article 1, Section 9, Clause 8 of the Constitution of the United States of America which reads in part: "And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept any present, Emolument, Office or Title, of any kind whatever, from any King, Prince or foreign State," and of Article 1, Section 8, Clause 14 of the Constitution of the United States of America which provides that the Congress has the sole power "to make Rules for the Government and Regulation of the land and naval forces." The amended charter of April 26, 1946 is repugnant to and in violation of Article 1, Section 9, Clause 3, of the Constitution of the United States of America which provides that "No Bill of Attainder or ex post facto law shall be passed"; that the body of law specially stated in the charter for the International Military Tribunal for the Far East defined a novel and non-existent body of the law of nations as it relates to "crimes against peace," "crimes against humanity," and conspiracy to commit such alleged crimes and, being ex post facto, were, by the same token, rendered acts of attainder against the Petitioner; and in that the provision for the trial of "conventional war crimes" at the international level, rather than in national courts as practiced since time immemorial, changed the rules, standards and forum after the commission of acts and omission for which the Petitioner was convicted and constituted ex post facto action; that the issuance of such special charter was repugnant to and in violation of Article 1, Section 8, Clause 10 of the Constitution of the United

States of America which provides that the Congress shall have sole power "to define and punish * * * offenses against the laws of nations," in that the Congress of the United States has never at any time defined any such body of law; nor has the "law" stated in the charter been otherwise recognized by the legislative, executive or judicial authority of the United States of America to be either national law or the law of nations; that the statement of such alleged body of law set forth in the special charter is repugnant to and in violation of the Fifth Amendment to the Constitution of the United States of America which provides in part, "No person * * * shall * * * be deprived of life, liberty, or property, without due process of law; * * *," in that the statement of such a novel body of law, having no previous existence or recognition at either the national or international level by the United States or in other civilized nations, deprived this Petitioner in circumstances of this case of life and liberty without due process of law under authority and color of an act performed by a citizen and a military officer of the United States; that the action of General of the Army Douglas MacArthur, in stating such novel body of law in the special charter, constituted the exercise of legislative power not derived from the Constitution or laws of the United States of America or the laws of any foreign country represented on such Tribunal; and further neither the Potsdam Declaration nor the Japanese instrument of surrender created or established any new law, nor did said instruments authorize the creation or the establishment of any new law, national or international, for the trial of war criminals or the procedure to which Petitioner was subjected.

General of the Army Douglas MacArthur, in making and promulgating the amended charter of April 26, 1946 for the establishment, government and procedure of the Tribunal, so limited and circumscribed the functions and powers of the Tribunal and so altered, revised and abrogated the basic, essential and fundamental rules of evidence, procedure and trial as heretofore applied by National Military Tribunals and commissions and courts of criminal justice in all civilized nations, including the United States of America, that said amended charter itself deprived the Tribunal of all opportunity and power to accord this Petitioner a fair and impartial trial in accordance with basic, accepted and minimal standards of justice of all civilized nations; and this action is repugnant to and in violation of the 5th and 6th Amendments of the Constitution of the United States of America which provide in part, "No person * * * shall be deprived of life, liberty, or property, without due process of law; * * *," and "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." Said Tribunal in pursuance of the unprecedented procedure set forth in the charter received in evidence against this Petitioner, over objection and the exception of this Petitioner, hundreds of documents consisting of ex parte affidavits, unsigned and unsworn statements, diary entries, newspaper reports, unofficial documents, hearsay statements of the second and third degree, secondary evidence of the contents of the documents, unidentified reports, long prosecution summaries of its version of the contents of innumerable affidavits, reports, etc. which were not them-

selves introduced in evidence and which summary was accepted by the Tribunal as an exhibit in the trial; and the Tribunal thus deprived the Petitioner of the ordinary right of cross-examination and elementary justice; in pursuance of said special charter the Tribunal refused to call as witnesses at the request of the Petitioner the persons whose ex parte affidavits were admitted into evidence over his objection and exception; and the Tribunal on innumerable occasions refused to call witnesses at the request of the Petitioner who were reasonably expected to give testimony relevant and material to the defense of this Petitioner; and in pursuance of the special and relaxed provisions of said charter the Tribunal required the Defendants to submit a higher standard of proof than was required of the Prosecution throughout the 8 months it took for presentation of its case; and otherwise the proceedings and rulings of said Tribunal on hundreds of occasions, mostly by majority vote, throughout the trial were contrary to the practice and procedure of national military courts and criminal courts, and by reason thereof the findings and judgment of said Tribunal were vitiated.

The basic actions of said Tribunal prejudicial to this Petitioner were further emphasized and facilitated by provisions of the special charter as follows:

Article 4(c) which provided that a judge of the Tribunal may function in absentia and as several of the judges absented themselves for considerable periods of time during the course of the trial, this Petitioner was deprived of the right to have such judges see and hear the witnesses for and against him and an opportunity to appraise their credibility; Article 5(a)

to (c), all inclusive, purported to define without authority of law, ex post facto, what constitutes alleged war crimes and violation of the laws and customs of war, thus depriving the Tribunal of all opportunity to judge and ascertain in its own right the status, meaning and condition of the laws of war as applied by the various nations of the world and by the nations represented on the Tribunal; Article 6 which permitted the Tribunal, as it did in fact, to strip this Petitioner of the right to defend on the ground that he acted or omitted to act by virtue of an order of the Japanese Government or of a superior; Article 13(a) which provided without authority of law that the technical rules of evidence (as heretofore applied by military tribunals, commissions and criminal courts) shall not be binding on the Tribunal and that the Tribunal may apply an unknown standard and rule of evidence of its own making, limited only by the views of the majority of the Tribunal as to what constituted "probative value"; Article 13(c)(1) to (5), all inclusive, which provided generally for the admission of evidence against this Petitioner by the Tribunal on innumerable occasions of hearsay and ex parte statements, reports, affidavits and depositions, thereby depriving the Petitioner of the ordinary right established since time immemorial to be confronted in military and criminal trials by the witnesses against him and to be afforded an opportunity to cross-examine any witness against him; and Article 13(a) which provides that the Tribunal may take judicial notice of various described matters, which it did on innumerable occasions, dealing wth subjects never heretofore considered by any military or judicial Tribunal as falling within the doctrine of judicial notice. The trial conducted by such Tribunal, pursuant to the

special charter, was prejudicial to your Petitioner in that the Tribunal in applying the charter rule of "probative value" summarily rejected by majority vote hundreds upon hundreds of material and relevant documents indispensable to the defense of this Petitioner upon the charges contained in the indictment and upon which he was convicted.

20. Petitioner alleges that nothing contained in the Potsdam Declaration or the Japanese instrument of surrender authorized the trial of this Petitioner or any other so-called war criminals for acts or omissions committed prior to the beginning of the Pacific war proper on December 7, 1941; and that the Japanese Government in accepting the terms embodied in the instrument of surrender understood and intended at that time that the provision relating to the punishment of "war criminals" applied only to acts of omissions occurring in connection with the Pacific war proper after December 7, 1941.

21. The International Military Tribunal for the Far East at the inception of the trial recommended to the Supreme Commander for the Allied Powers that Japanese Defense Counsel required the assistance and guidance of American Defense Counsel in order to properly prepare and present the defense, and such counsel were provided. The sole American Defense Counsel appearing for this Petitioner was suspended from further participation in the trial at the inception of the defense case and for six months thereafter during the taking of evidence of the defense case this Petitioner was deprived of American counsel to protect his individual interest in open court.

22. The Petitioner was convicted on Counts 1, 27 and 55, and under the findings of the Tribunal the conviction rested on acts and omissions which occurred prior to December 7, 1941, in its entirety. As the sentence of death imposed upon Petitioner was a single sentence applying to acts and omissions occurring prior to the Pacific war proper on December 7, 1941, the conviction of the Petitioner in its entirety is beyond the scope and purview of the Japanese instrument of surrender and the Potsdam Declaration and is, therefore, null and void in its entirety.

23. All of the points raised in this Petition were urged before the International Military Tribunal for the Far East and were rejected by it.

WHEREFORE, the premises considered, Petitioner respectfully prays:

1. That this Honorable Court issue forthwith the Writ of Habeas Corpus directed to the Defendants herein, but Petitioner waives the production of his person before this Court.

2. In the alternative, that the Tribunal stay the execution of the death sentence imposed upon the Petitioner until such time as this Honorable Court is able to consider this Petition upon its merits.

3. That upon final hearing the Petitioner be discharged from the custody of the Defendants and be restored to his liberty.

4. And for such other, further and general relief as to this Honorable Court may seem just and proper.

All of which is most respectfully submitted:

KOKI HIROTA

By DAVID F. SMITH,
his attorney and next friend

DAVID F. SMITH,
Attorney for Petitioner
Roger Smith Hotel
18th and Pa. Ave. N.W.
Washington, D. C.

WILLIAM LOGAN, JR., of Counsel
120 Broadway
New York City, New York

GEORGE YAMAOKA, of Counsel
120 Broadway
New York City, New York

District of Columbia, ss.:

DAVID F. SMITH, being first duly sworn according to law upon oath deposes and says that he was a duly appointed American Defense Counsel in the major trial of alleged war criminals before the International Military Tribunal for the Far East; that the Petitioner, Koki Hirota, is now confined in Sugamo Prison, in Tokyo, Japan; by reason of the peculiar circumstances of the case and because of considerations of distance and time and the

fact that the Petitioner is under sentence of death by hanging instanter, there has not been, and will not be, sufficient time to forward this Petition to the Petitioner for his signature and oath; that because of the foregoing this Petition has been executed by affiant instead of Petitioner; that affiant has read the foregoing Petition and upon information and belief verily believes the same to be true. Affiant further states that this Petition is filed in good faith without any purpose of delay.

DAVID F. SMITH,
Attorney and next friend for Petitioner,
Koki Hirota.

Subscribed and sworn to before me this 29th day of November, 1948.

CATHERINE C. BENSON,
Notary Public.

(Seal)

Service of a copy of the foregoing Petition for Writ of Habeas Corpus, Motion for Leave to file same, Motion for Stay of Execution, and Affidavit In Forma Pauperis acknowledged this 29th day of November, 1948.

PHILIP B. PERLMAN,
Solicitor General,
United States.

Motion for Stay of Execution

IN THE

SUPREME COURT OF THE UNITED STATES

Misc. No. 239

KOKI HIROTA, a citizen and national of Japan, appearing by his attorney and next friend, David F. Smith,

Petitioner,

vs.

General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers; *et al.*,

Defendants.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes the Petitioner, KOKI HIROTA, by his attorney and next friend, David F. Smith, and moves this Honorable Court for an immediate order, based upon the annexed Petition for a Writ of Habeas Corpus, directed to the Defendants, and each of them, ordering a stay of execution of the death sentence imposed upon the Petitioner until the further order of this Court.

KOKI HIROTA,
By DAVID F. SMITH,
Attorney and next friend of Petitioner,
Koki Hirota.

DAVID F. SMITH,
Attorney of Record for Petitioner,
Roger Smith Hotel,
18th and Pa. Ave., N.W.,
Washington, D. C.

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

Misc. No. 240

KENJI DOHIHARA, a citizen and national of Japan; appearing by his attorney and next friend, William Logan, Jr.,

Petitioner,

vs.

1. General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers. 2. Lieut. General Walton H. Walker, individually and as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan. 3. James V. Forrestal, individually and as Secretary of National Defense of the United States, and 4. Kenneth C. Royall, individually and as Secretary, Department of the Army of the United States,

Defendants.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS, PETITION FOR WRIT OF HABEAS CORPUS, MOTION FOR STAY OF EXECUTION AND AFFIDAVIT IN *FORMA PAUPERIS*

DAVID F. SMITH,
Attorney for Petitioner.

WILLIAM LOGAN, JR.
JOHN G. BRANNON,
FRANKLIN E. N. WARREN,
Of Counsel.

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IN THE

Supreme Court of the United States

Misc. No. 240

KENJI DOHIHARA, a citizen and national of Japan, appearing by his attorney and next friend, William Logan, Jr.,

Petitioner,

vs.

General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers; *et al.*,

Defendants.

Motion for Leave to File Annexed Petition for a Writ of Habeas Corpus on Behalf of Kenji Dohihara

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

And now comes the Petitioner, KENJI DOHIHARA, by his attorney and next friend, William Logan, Jr., and by David F. Smith, his attorney of record, and moves this Honorable Court to enter an order allowing the annexed Petition for a Writ of Habeas Corpus on behalf of KENJI DOHIHARA to be filed and prosecuted.

KENJI DOHIHARA.

By WILLIAM LOGAN, JR.,
His Attorney and Next Friend

DAVID F. SMITH,
Attorney of Record for Petitioner.

Petition for Writ of Habeas Corpus

IN THE

SUPREME COURT OF THE UNITED STATES

Misc. No. 240

KENJI DOHIHARA, a citizen and national of Japan, appearing by his attorney and next friend, William Logan, Jr.,

Petitioner,

vs.

1. General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers. 2. Lieut. General Walton H. Walker, individually and as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan. 3. James V. Forrestal, individually and as Secretary of National Defense of the United States, and 4. Kenneth C. Royall, individually and as Secretary, Department of the Army of the United States,

Defendants.

The Petition of KENJI DOHIHARA, a citizen and national of Japan, respectfully represents to the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States, the following:

1. The Defendant, General of the Army Douglas MacArthur is a citizen of the United States, and is sued individually and as General of the Army of the United States in the Military Occupied Territory of Japan and in his capacity as Supreme Commander for the Allied Powers and also as the person who has the efficient custody and control of the Petitioner.

2. The Defendant, Lieut. General Walton H. Walker is a citizen of the United States and is sued individually and as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan and as the person who has the immediate physical custody of the Petitioner.

3. The Defendant, James V. Forrestal, is a citizen of the United States and is sued herein individually and as Secretary of National Defense of the United States and as the person who has the power to command the Defendants, General of the Army Douglas MacArthur and Lieut. General Walton H. Walker.

4. The Defendant, Kenneth C. Royall is a citizen of the United States and is sued herein individually and as Secretary of the Department of the Army of the United States and also as the person who has the efficient power to control the official acts of General of the Army Douglas MacArthur and Lieut. General Walton H. Walker.

5. Petitioner was arrested and taken into custody upon an order issued by the Commanding General of the United States 8th Army of Japan, and confined to Sugamo Prison in Tokyo, Japan, in the latter part of 1945, and the Petitioner has been detained in said prison ever since.

6. Petitioner alleges that he has been unlawfully imprisoned and restrained of his liberty continuously since the latter part of 1945 by reason of illegal actions taken by the Defendants herein, all of which will more specifically appear hereinafter.

7. On December 1, 1943, the United States of America, the Republic of China, and the United Kingdom, by

the heads of their respective Governments, proclaimed as follows:

"THE CAIRO CONFERENCE

UNITED STATES OF AMERICA: PRESIDENT ROOSEVELT
CHINA: GENERALISSIMO CHIANG KAI-SHEK
UNITED KINGDOM: PRIME MINISTER CHURCHILL

Statement Released December 1, 1943.

"The several military missions have agreed upon future military operations against Japan. The Three Great Allies expressed their resolve to bring unrelenting pressure against their brutal enemies by sea, land, and air. This pressure is already rising.

"The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. They covet no gain for themselves and have no thought of territorial expansion. It is their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent.

"With these objects in view the three Allies, in harmony with those of the United Nations at war with Japan, will continue to persevere in the serious and prolonged operations necessary to procure the unconditional surrender of Japan."

8. On July 26, 1945, a proclamation was issued by the heads of the Governments of the United States,

United Kingdom, and China, known as the Potsdam Declaration, which reads as follows:

"POTSDAM DECLARATION

PROCLAMATION BY HEADS OF GOVERNMENTS, UNITED STATES, UNITED KINGDOM, AND CHINA

"(1) We—the President of the United States, the President of the National Government of the Republic of China, and the Prime Minister of Great Britain, representing the hundreds of millions of our countrymen, have conferred and agree that Japan shall be given an opportunity to end this war.

"(2) The prodigious land, sea and air forces of the United States, the British Empire and of China, many times reinforced by their armies and air fleets from the west, are poised to strike the final blows upon Japan. This military power is sustained and inspired by the determination of all the Allied Nations to prosecute the war against Japan until she ceases to resist.

"(3) The result of the futile and senseless German resistence to the might of the aroused free peoples of the world stands forth in awful clarity as an example to the people of Japan. The might that now converges on Japan is immeasurably greater than that which, when applied to the resisting Nazis, necessarily laid waste to the lands, the industry and the method of life of the whole German people. The full application of our military power, backed by our resolve, *will* mean the inevitable and complete destruction of the Japanese armed forces and just as inevitably the utter devastation of the Japanese homeland.

"(4) The time has come for Japan to decide whether she will continue to be controlled by those self-willed militaristic advisers whose unintelligent calculations have brought the Empire of Japan to the

threshold of annihilation, or whether she will follow the path of reason.

"(5) *Following are our terms.* We will not deviate from them. There are no alternatives. We shall brook no delay.

"(6) There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.

"(7) Until such a new order is established *and* until there is convincing proof that Japan's war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objectives we are here setting forth.

"(8) The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.

"(9) The Japanese military forces, after being completely disarmed, shall be permitted to return to their homes with the opportunity to lead peaceful and productive lives.

"(10) We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights, shall be established.

"(11) Japan shall be permitted to maintain such industries as will sustain her economy and permit the exaction of just reparations in kind, but not those which would enable her to re-arm for war. To this

end, access to, as distinguished from control of, raw materials shall be permitted. Eventual Japanese participation in world trade relations shall be permitted.

"(12) The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished and there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government.

"(13) We call upon the government of Japan to proclaim now the unconditional surrender of all Japanese armed forces, and to provide proper and adequate assurances of their good faith in such action. The alternative for Japan is prompt and utter destruction."

9. On September 2, 1945, on board the *U. S. S. Missouri* an instrument of surrender on behalf of the Japanese Empire was signed and which reads as follows:

"INSTRUMENT OF SURRENDER

"We, acting by command of and in behalf of the Emperor of Japan, the Japanese Government and the Japanese Imperial General Headquarters, hereby accept the provisions set forth in the declaration issued by the heads of the Governments of the United States, China and Great Britain on 26 July 1945 at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics, which four powers are hereafter referred to as the Allied Powers.

"We hereby proclaim the unconditional surrender to the Allied Powers of the Japanese Imperial General Headquarters and of all Japanese armed forces and all armed forces under Japanese control wherever situated.

"We hereby command all Japanese forces wherever situated and the Japanese people to cease hostilities

forthwith, to preserve and save from damage all ships, aircraft, and military and civil property and to comply with all requirements which may be imposed by the Supreme Commander for the Allied Powers or by agencies of the Japanese Government at his direction.

"We hereby command the Japanese Imperial General Headquarters to issue at once orders to the Commanders of all Japanese forces and all forces under Japanese control wherever situated to surrender unconditionally themselves and all forces under their control.

"We hereby command all civil, military and naval officials to obey and enforce all proclamations, orders and directives deemed by the Supreme Commander for the Allied Powers to be proper to effectuate this surrender and issued by him or under his authority and we direct all such officials to remain at their posts and to continue to perform their non-combatant duties unless specifically relieved by him or under his authority.

"We hereby undertake for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever action may be required by the Supreme Commander for the Allied Powers or by any other designated representative of the Allied Powers for the purpose of giving effect to that Declaration.

"We hereby command the Japanese Imperial Government and the Japanese Imperial General Headquarters at once to liberate all allied prisoners of war and civilian internees now under Japanese control and to provide for their protection, care, maintenance and immediate transportation to places as directed.

"The authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender.

"Signed at Tokyo Bay, Japan, at 0904 on the Second day of September, 1945.

"MAMORU SHIGEMITSU
By Command and in behalf of the Emperor of Japan and the Japanese Government.

YOSHIJIRO UMEZU
By Command and in behalf of the Japanese Imperial General Headquarters.

"Accepted at Tokyo Bay, Japan at 0908 on the Second day of September, 1945 for the United States, Republic of China, United Kingdom and the Union of Soviet Socialist Republics, and in the interests of the other United Nations at war with Japan.

DOUGLAS MACARTHUR—
Supreme Commander for the Allied Powers

"C. W. NIMITZ
United States
Representative

T. A. BLAMEY
Commonwealth of
Australia
Representative

HSU YUNG-CHANG
Republic of China
Representative

L. MOORE COSGRANE
Dominion of Canada
Representative

BRUCE FRASER
United Kingdom
Representative

LE CLERC
Provisional Government of
the French Republic
Representative

LIEUTENANT GENERAL
K. DEREVYANKO
Union of Soviet
Socialist Republics
Representative

C. E. L. HELFRICH
Kingdom of the Netherlands
Representative

LEONARD M. ISITT
Dominion of New Zealand Representative"

10. On September 2, 1945, the following proclamation was issued by the Emperor of Japan:

"PROCLAMATION BY THE EMPEROR OF JAPAN

"Accepting the terms set forth in the Declaration issued by the heads of the Governments of the United States, Great Britain and China on July 26, 1945, at Potsdam and subsequently adhered to by the Union of Soviet Socialist Republics, I have commanded the Japanese Imperial Government and the Japanese Imperial General Headquarters to sign on my behalf the instrument of surrender presented by the Supreme Commander for the Allied Powers and to issue General Orders to the Military and Naval forces in accordance with the direction of the Supreme Commander for the Allied Powers. I command all my people forthwith to cease hostilities, to lay down their arms and faithfully to carry out all the provisions of the instrument of surrender and the General Orders issued by the Japanese Imperial General Headquarters thereunder."

11. On January 19, 1946, the Defendant, General of the Army Douglas MacArthur, acting in his capacity as General of the Army of the United States and Supreme Commander for the Allied Powers, issued a special proclamation at Tokyo, Japan, for the establishment of an International Military Tribunal for the Far East, which reads as follows:

"SPECIAL PROCLAMATION

ESTABLISHMENT OF AN INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

"WHEREAS, the United States and the Nations allied therewith in opposing the illegal wars of aggression of the Axis Nations, have from time to time made declarations of their intentions that war criminals should be brought to justice;

"WHEREAS, the Governments of the Allied Powers at war with Japan on the 26th July 1945 at Potsdam, declared as one of the terms of surrender that stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners;

"WHEREAS, by the Instrument of Surrender of Japan executed at Tokyo Bay, Japan, on the 2nd September 1945, the signatories for Japan, by command of and in behalf of the Emperor and the Japanese Government accepted the terms set forth in such Declaration at Potsdam;

"WHEREAS, by such Instrument of Surrender, the authority of the Emperor and the Japanese Government to rule the state of Japan is made subject to the Supreme Commander for the Allied Powers, who is authorized to take such steps as he deems proper to effectuate the terms of surrender;

"WHEREAS, the undersigned has been designated by the Allied Powers as Supreme Commander for the Allied Powers to carry into effect the general surrender of the Japanese armed forces;

"WHEREAS, the Government of the United States, Great Britain and Russia at the Moscow Conference, 26th December 1945, having considered the effectuation by Japan of the Terms of Surrender, with the concurrence of China have agreed that the Supreme Commander shall issue all Orders for the implementation of the Terms of Surrender.

"NOW, THEREFORE, I, Douglas MacArthur, as Supreme Commander for the Allied Powers, by virtue of the authority so conferred upon me, in order to implement the Term of Surrender which requires the meting out of stern justice to war criminals, do order and provide as follows:

"ARTICLE 1. There shall be established an international Military Tribunal for the Far East for the trial of those persons charged individually, or as members of organizations, or in both capacities, with offenses which include crimes against peace.

"ARTICLE 2. The Constitution, jurisdiction and functions of this Tribunal are those set forth in the Charter of the International Military Tribunal for the Far East, approved by me this day.

"ARTICLE 3. Nothing in this Order shall prejudice the jurisdiction of any other international, national or occupation court, commission or other tribunal established or to be established in Japan or in any territory of a United Nation with which Japan has been at war, for the trial of war criminals.

"Given under my hand at Tokyo, this 19th day of January, 1946.

DOUGLAS MACARTHUR,
General of the Army, United States Army
Supreme Commander for the Allied Powers."

12. On April 26, 1946, General of the Army Douglas MacArthur issued General Orders No. 26, amending General Orders No. 1, which promulgated the Charter of the International Military Tribunal for the Far East as follows:

GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS

APO 500
26 April 1946

GENERAL ORDERS
Nos / / 20

"General Orders No. 1, General Headquarters, Supreme Commander for the Allied Powers, 19 January 1946, subject as below, is superseded. The Charter of the International Military Tribunal for the Far East established by Proclamation of the Supreme Commander for the Allied Powers, 19 January 1946, is amended, and as amended, reads as follows:

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

SECTION I

CONSTITUTION OF TRIBUNAL

"ARTICLE 1. *Tribunal Established.* The International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo.

"ARTICLE 2. *Members.* The Tribunal shall consist of not less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines.

"ARTICLE 3. *Officers and Secretariat.*

"a. *President.* The Supreme Commander for the Allied Powers shall appoint a Member to be President of the Tribunal.

"b. *Secretariat.*

"(1) The Secretariat of the Tribunal shall be composed of a General Secretary to be appointed by the Supreme Commander for the Allied Powers and such assistant secretaries, clerks, interpreters, and other personnel as may be necessary.

"(2) The General Secretary shall organize and direct the work of the Secretariat.

"(3) The Secretariat shall receive all documents addressed to the Tribunal, maintain the records of the Tribunal, provide necessary clerical services to the

Tribunal and its members, and perform such other duties as may be designated by the Tribunal.

"ARTICLE 4. *Convening and Quorum, Voting and Absence.*

"a. *Convening and Quorum.* When as many as six members of the Tribunal are present, they may convene the Tribunal in formal session. The presence of a majority of all members shall be necessary to constitute a quorum.

"b. *Voting.* All decisions and judgments of this Tribunal, including convictions and sentences, shall be by a majority vote of those members of the Tribunal present. In case the votes are evenly divided, the vote of the President shall be decisive.

"c. *Absence.* If a member at any time is absent and afterwards is able to be present, he shall take part in all subsequent proceedings; unless he declares in open court that he is disqualified by reason of insufficient familiarity with the proceedings which took place in his absence.

"SECTION II

JURISDICTION AND GENERAL PROVISIONS

"ARTICLE 5. *Jurisdiction Over Persons and Offenses.* The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

"a. *Crimes against Peace.* Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances,

or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

"b. *Conventional War Crimes*: Namely, violations of the laws or customs of war;

"c. *Crimes against Humanity*: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or prosecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

"ARTICLE 6. *Responsibility of Accused.* Neither the official position, at any time, of any accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

"ARTICLE 7. *Rules of Procedure.* The Tribunal may draft and amend rules of procedure consistent with the fundamental provisions of this Charter.

"ARTICLE 8. *Counsel.*

"a. *Chief of Counsel.* The Chief of Counsel designated by the Supreme Commander for the Allied Powers is responsible for the investigation and prosecution of charges against war criminals within the jurisdiction of this Tribunal and will render such legal assistance to the Supreme Commander as is appropriate.

"b. *Associate Counsel.* Any United Nation with which Japan has been at war may appoint an Associate Counsel to assist the Chief of Counsel.

"SECTION III

"Fair Trial for Accused

"Article 9. *Procedure for Fair Trial.* In order to insure fair trial for the accused the following procedure shall be followed:

"a. *Indictment.* The indictment shall consist of a plain, concise, and adequate statement of each offense charged. Each accused shall be furnished, in adequate time for defense, a copy of the indictment, including any amendment, and of this Charter, in a language understood by the accused.

"b. *Language.* The trial and related proceedings shall be conducted in English and in the language of the accused. Translations of documents and other papers shall be provided as needed and requested.

"c. *Counsel for Accused.* Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial.

"d. *Evidence for Defense.* An accused shall have the right, through himself or through his counsel (but not through both), to conduct his defense, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine.

"e. *Production of Evidence for the Defense.* An accused may apply in writing to the Tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located. It shall also state the facts proposed to be proved by the witness or the document

and the relevancy of such facts to the defense. If the Tribunal grants the application the Tribunal shall be given such aid in obtaining production of the evidence as the circumstances require.

"ARTICLE 10. *Applications and Motions before Trial.* All motions, applications, or other requests addressed to the Tribunal prior to the commencement of trial shall be made in writing and filed with the General Secretary of the Tribunal for action by the Tribunal.

"SECTION IV

POWERS OF TRIBUNAL AND CONDUCT OF TRIAL

"ARTICLE 11. *Powers.* The Tribunal shall have the power:

"a. To summon witnesses to the trial, to require them to attend and testify, and to question them.

"b. To interrogate each accused and to permit comment on his refusal to answer any question.

"c. To require the production of documents and other evidentiary material.

"d. To require of each witness an oath, affirmation, or such declaration as is customary in the country of the witness, and to administer oaths.

"e. To appoint officers for the carrying out of any task designated by the Tribunal, including the power to have evidence taken on commission.

"ARTICLE 12. *Conduct of Trial.* The Tribunal shall:

"a. Confine the trial strictly to an expeditious hearing of the issues raised by the charges.

"b. Take strict measures to prevent any action which would cause any unreasonable delay and rule out irrelevant issues and statements of any kind whatsoever.

"c. Provide for the maintenance of order at the trial and deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any accused or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

"d. Determine the mental and physical capacity of any accused to proceed to trial.

"ARTICLE 13. *Evidence.*

"a. *Admissibility.* The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible.

"b. *Relevance.* The Tribunal may require to be informed of the nature of any evidence before it is offered in order to rule upon the relevance.

"c. *Specific evidence admissible.* In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

"(1) A document, regardless of its security classification and without proof of its issuance or signature, which appears to the Tribunal to have been signed or issued by any officer, department, agency or member of the armed forces of any government.

"(2) A report which appears to the Tribunal to have been signed or issued by the International Red Cross or a member thereof, or by a doctor of medicine or any medical service personnel, or by an investigator or intelligence officer, or by any other person who appears to the Tribunal to have personal knowledge of the matters contained in the report;

"(3) An affidavit, deposition or other signed statement.

"(4) A diary, letter or other document, including sworn or unsworn statements, which appear to the Tribunal to contain information relating to the charge.

"(5) A copy of a document or other secondary evidence of its contents, if the original is not immediately available.

"d. *Judicial Notice.* The Tribunal shall neither require proof of facts of common knowledge, nor of the authenticity of official government documents and reports of any nation nor of the proceedings, records, and findings of military or other agencies of any of the United States.

"e. *Records, Exhibits, and Documents.* The transcript of the proceedings, and exhibits and documents submitted to the Tribunal, will be filed with the General Secretary of the Tribunal and will constitute part of the Record.

"ARTICLE 14. *Place of Trial.* The first trial will be held at Tokyo, and any subsequent trials will be held at such places as the Tribunal decides.

"ARTICLE 15. *Course of Trial Proceedings.* The proceedings at the Trial will take the following course:

"a. The indictment will be read in court unless the reading is waived by all accused.

"b. The Tribunal will ask each accused whether he pleads 'guilty' or 'not guilty.'

"c. The prosecution and each accused (by counsel only, if represented) may make a concise opening statement.

"d. The prosecution and defense may offer evidence, and the admissibility of the same shall be determined by the Tribunal.

"e. The prosecution and each accused (by counsel only, if represented) may examine each witness and each accused who gives testimony.

"f. Accused (by counsel only, if represented) may address the Tribunal.

"g. The prosecution may address the Tribunal.

"h. The Tribunal will deliver judgment and pronounce sentence.

"SECTION V

JUDGMENT AND SENTENCE

"ARTICLE 16. *Penalty.* The Tribunal shall have the power to impose upon an accused, on conviction, death, or such other punishment as shall be determined by it to be just.

"ARTICLE 17. *Judgment and Review.* The judgment will be announced in open court and will give the reasons on which it is based. The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action. Sentence will be carried out in accordance with the Order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence, except to increase its severity.

"By command of General MacARTHUR:

"RICHARD J. MARSHALL
Major General, General Staff Corps,
Chief of Staff

OFFICIAL:

s/ B. M. Fitch
B. M. FITCH,
Brigadier General, AGD,
Adjutant General."

13. On February 15, 1946, General of the Army Douglas MacArthur, acting on behalf of 11 governments comprising the Allied Powers, including the Government of the United States of America, appointed nominees of each of the Allied Powers to act as judges on the International Military Tribunal for the Far East, and in a trial thereafter conducted by said Tribunal, as hereinafter set forth, General of the Army Douglas MacArthur substituted another judge as the nominee of the United States after the trial had been in progress approximately three months. Two of the judges so appointed were military officers in active service of the countries which nominated them.

14. The International Military Tribunal for the Far East conducted a trial under an indictment returned pursuant to the terms of the aforesaid Charter, to which indictment the Petitioner pleaded not guilty. The Tribunal took evidence for a period of nearly two years, and on November 12, 1948 the Tribunal by a majority finding and judgment found the Petitioner guilty of "conspiracy to wage aggressive war" under count 1 and "of waging aggressive wars", as charged under counts 27, 29, 31, 32, 35 and 36, and upon count 54 which charged neglect of duty in the treatment of prisoners of war. The indictment contained 55 counts and 5 appendices, all of which were contained in 59 closely printed pages. The counts upon which Petitioner was convicted read as follows:

"Count 1

"All the accused together with other persons, between the 1st January, 1928, and the 2nd September, 1945, participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a

common plan or conspiracy, and are responsible for all acts performed by any person in execution of such plan.

"The object of such plan or conspiracy was that Japan should secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and of all countries bordering thereon and islands therein, and for that purpose they conspired that Japan should alone or in combination with other countries having similar objects, or who could be induced or coerced to join therein, wage declared or undeclared war or wars of aggression, and war or wars in violation of international law, treaties, agreements and assurances, against any country or countries which might oppose that purpose.

"The whole of the Particulars in Appendix A, of the Treaty Articles in Appendix B, and of the Assurances in Appendix C, relate to this Count."

"Count 27

"All the accused, between the 18th September, 1931, and the 2nd September, 1945, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Republic of China.

"The same Particulars, Treaty Articles and Assurances as in Count 2, relate to this Count."

"County 29

"All the accused, between the 7th December, 1941, and the 2nd September, 1945, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the United States of America.

"The following Sections of the Particulars in Appendix A: Nos. 4 to 10 inclusive; and the same Treaty Articles and Assurances as in Count 20, relate to this Count."

"Count 31

"All the accused, between the 7th December, 1941, and the 2nd September, 1945, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the British Commonwealth of Nations.

"The following Sections of the Particulars in Appendix A: Nos. 4 to 10 inclusive; and the same Treaty Articles and Assurances as in Count 22, relate to this Count."

"Count 32

"All the accused, between the 7th December, 1941, and the 2nd September, 1945, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Kingdom of the Netherlands.

"The same Particulars, Treaty Articles and Assurances as in Count 14, relate to this Count."

"Count 35

"The same accused as in Count 25, during the summer of 1938, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Union of Soviet Socialist Republics.

"The same Particulars, Treaty Articles and Assurances as in Count 17, relate to this Count."

"Count 36

"The same accused as in Count 26, during the summer of 1939, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances against the Mongolian People's Republic and the Union of Soviet Socialist Republics.

"The same Particulars, Treaty Articles and Assurances as in Count 17, relate to this Count."

"Count 54

"The accused DOHIHARA, HATA, HOSHINO, ITAGAKI, KAYA, KIDO, KIMURA, KOISO, MUTO, NAGANO, OKA, OSHIMA, SATO, SHIGEMITSU, SHIMADA, SUZUKI, TOGO, TOJO and UMEZU, between the 7th December, 1941, and the 2nd September, 1945, ordered, authorized and permitted the commanders-in-chief and other persons mentioned in Count 53 to commit the offences therein mentioned and thereby violated the laws of War.

"In the case of the Republic of China the said orders, authorizations and permissions were given in a period beginning on the 18th September, 1931, and the following accused were responsible for the same in addition to those named above: ARAKI, HASHIMOTO, HIRANUMA, HIROTA, MATSUI, MATSUOKA, MINAMI."

15. Pursuant to the finding and judgment of guilt by the International Military Tribunal of the Far East under the aforesaid indictment, the Tribunal sentenced the Petitioner to be hanged. Thereafter, within the period of one week allowed for an appeal by the General of the Army Douglas MacArthur, Petitioner did appeal citing various errors committed by the Tribunal during the course and proceedings of the trial.

16. On or about November 23, 1948 the Defendant, General of the Army Douglas MacArthur denied the appeal of the Petitioner and issued an order commanding the Defendant, Lieut. General Walton H. Walker as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan, to carry out at an undisclosed time the sentence as "pronounced by the Tribunal" as approved and affirmed by General of the Army Douglas MacArthur and Supreme Commander for the Allied Powers. Petitioner alleges that he will be executed *instanter* unless afforded relief by this Honorable Court.

17. The Petitioner alleges that this Honorable Court has jurisdiction to issue the writ of Habeas Corpus requested herein and grant the relief sought under §§ 451 to 462, inclusive, of Title 28 of the United States Code, under the constitution, treaties, international engagements and laws of the United States. The Petitioner is presently in custody under and by color of the authority of the United States; is in custody in violation of the constitution, treaties, international engagements and laws of the United States; and is in custody for acts done or omitted under right, title, authority, privilege, protection, and the exemption which he claims under the commission, order, or sanction of the Japanese Government as a regular line officer of the Japanese Army, the validity and effect whereof depend upon the law of nations.

18. Petitioner alleges that General of the Army, Douglas MacArthur, as a citizen of the United States, acting either in his capacity as General of the Army of the United States or as Supreme Commander for the Allied Powers, had no authority at any time from the Congress or the President of the United States to create the International Military Tribunal for the Far East or to issue a special charter for the government and procedure of said Tribunal; that nothing contained in the Potsdam Declaration or the Japanese instrument of surrender of September 2, 1945, or anything done by way of implementation of the Japanese instrument of surrender, furnished any basis for the creation of an International Military Tribunal for the trial of "crimes against peace," "crimes against humanity," and "conspiracy to commit crimes against peace and against humanity"; or

for the trial of "conventional war crimes in violation of the customs and usage of war," in any court other than a national court.

General of the Army Douglas MacArthur has not heretofore been authorized by any law enacted by the Congress of the United States of America or any provision of its Constitution to establish a Military Tribunal for the trial of war criminals other than an American Military Tribunal or commission; nor has the Congress of the United States of America authorized him to appoint American or Philippine civilian or military judges to an International Military Court or to associate or pool American interests and powers in such a Tribunal; nor has the Congress of the United States ever authorized or empowered him to accept an appointment or office or place of trust from sovereign foreign nations for the purpose of establishing an International Military Tribunal or to appoint either civilian or military judges of those foreign nations to such Tribunal; that the powers resting in General of the Army Douglas MacArthur as Supreme Commander for the Allied Powers, are confined to the Military Occupation of Japan, the coordination of such operations, maintenance of the security of the occupation, the power to appoint an American Military Tribunal or commission for the trial of conventional war crimes alone as the same have been heretofore defined in the customs and usages of war and in the Articles of War enacted by the Congress of the United States.

The action of General of the Army Douglas MacArthur, in accepting an office, title and place of trust from 10 foreign governments without consent of the Congress of the United States of America, and under-

taking to appoint civil and military judges to sit in an International Military Tribunal to represent such foreign governments and the United States, and his reservation of the right to review, approve, reverse or modify the final decision of such Tribunal, was and is in violation of Article 1, Section 9, Clause 8 of the Constitution of the United States of America which reads in part: "And no Person Holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept any present, Emolument, Office or Title, of any kind whatever, from any King, Prince or foreign State," and of Article 1, Section 8, Clause 14 of the Constitution of the United States of America which provides that the Congress has the sole power "To make Rules for the Government and Regulation of the land and naval forces" of the United States of America. The amended charter of April 26, 1946 is repugnant to and in violation of Article 1, Section 9, Clause 3 of the Constitution of the United States of America which provides that "No Bill of Attainder or ex post facto law shall be passed," and that the body of law specially stated in the charter for the International Military Tribunal for the Far East defined a novel body of law as it relates to "crimes against peace," "crimes against humanity," and "conspiracy to commit such alleged crimes" was *ex post facto*; which by the same token rendered such alleged crimes an act of attainder against the Petitioner; and in that the provision for the trial of "conventional war crimes" at the international level rather than in national courts as practiced since time immemorial, and change in the rules and forum after the commission of acts and omission for which the Petitioner was convicted also constituted an *ex post facto* action; that the issuance

of such special charter was repugnant to and in violation of Article 1, Section 8, Clause 10 of the Constitution of the United States of America which provides that the Congress shall have sole power "To define and punish * * * offenses against the laws of nations," in that the Congress of the United States has never at any time defined any such body of law, nor has it been otherwise recognized by the legislative, executive or judicial authority of the United States of America to be either national law or the law of nations, as General of the Army Douglas MacArthur purported to establish in said special charter for the government of such Tribunal; that the statement of such alleged body of law set forth further in the special charter is repugnant to and in violation of the Fifth Amendment to the Constitution of the United States of America which provides in part, "No person * * * shall * * * be deprived of life, liberty, or property, without due process of law; * * *," in that the statement of such a novel body of law, having no previous existence or recognition at either the national or international level by the United States or in other civilized nations, deprived this Petitioner in the circumstances of this case, of life and liberty without due process of law under authority and color of an act performed by a citizen and a military officer of the United States; that the action of General of the Army Douglas MacArthur, in stating such novel body of law in the special charter constituted the exercise of legislative power not derived from the Constitution or laws of the United States of America or the laws of any foreign country represented on such Tribunal; and further neither the Potsdam Declaration nor the Japanese instrument of surrender created or established any new law, national or inter-

national, nor did said instruments authorize the creation or establishment of any new law for the trial of war criminals or the procedure to which Petitioner was subjected. Whether the action of General of the Army Douglas MacArthur in creating the Tribunal be treated or viewed as the creation of a United States national military court or commission, or an international court, it was not authorized by any provisions of the United States Constitution and laws, or treaties, conventions, or compacts to which the United States was a party, or by the Japanese instrument of surrender.

General of the Army Douglas MacArthur, in making and promulgating the amended charter of April 26, 1946 for the establishment, government and procedure of the Tribunal, so limited and circumscribed the functions and power of the Tribunal and so altered, revised and abrogated the basic, essential and fundamental rules of evidence, procedure and trial as heretofore applied by National Military Tribunals and commissions and courts of criminal justice in all civilized nations, including the United States of America, that said amended charter itself deprived the Tribunal of all opportunity and power to accord this Petitioner a fair and impartial trial in accordance with basic, accepted and minimal standards of justice of all civilized nations; and this action is repugnant to and in violation of the 5th and 6th Amendments of the Constitution of the United States of America which provides in part, "No person * * * shall be deprived of life, liberty, or property, without due process of law; * * *," and "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the assistance of counsel for his defense." Said Tribunal in pursuance of the unprecedented procedure set forth in the charter admitted in evidence against this Petitioner over objection and the exception of this Petitioner hundreds of documents consisting of ex parte affidavits, unsigned and unsworn statements, diary entries, newspaper reports, unofficial documents, hearsay statements of the second and third degree, secondary evidence of the contents of the documents, unidentified reports, a long prosecution summary of its version of the contents of innumerable affidavits, reports, etc. which were not themselves introduced in evidence and which lengthy summary was accepted by the Tribunal as an exhibit in the case; and the Tribunal thus deprived the Petitioner of the right of cross-examination; in pursuance of said special charter the Tribunal refused to call in witnesses at the request of the Petitioner whose ex parte affidavits were admitted into evidence over his objection; and the Tribunal on a number of occasions refused to call witnesses at the request of the Petitioner who were reasonably expected to give testimony relevant and material to the defense of this Petitioner; and in pursuance of the special and relaxed provisions of said charter the Tribunal required Petitioner to submit a higher standard of proof than was required of the Prosecution throughout the 8 months it took for presentation of its case; and otherwise the proceedings and rulings of said Tribunal on hundreds of occasions mostly by majority vote throughout the trial were contrary to the procedure and practice of national military tribunals and criminal courts, and by reason thereof the findings and judgment of said Tribunal were vitiated.

The rulings of the Tribunal were made pursuant to special provisions of the charter as follows:

Article 4(e) which provided that a judge of the Tribunal may function in absentia and as several of the judges absented themselves for considerable periods of time during the course of the trial, this Petitioner was deprived of the right to have such judges see and hear the witnesses against him and an opportunity to appraise their credibility; Article 5(a) to (e), all inclusive, purported to define the law, without authority, *ex post facto*, and what constitutes the alleged war crimes and violation of the laws and customs of war, and thus depriving the Tribunal of all opportunity to judge and ascertain in its own right and status, meaning and condition of the laws of war as applied by the various nations of the world and by the nations represented on the Tribunal; Article 6 which permitted the Tribunal, as it did in fact, to strip this Petitioner of the right to defend on the ground that he acted or omitted to act by virtue of an order of the Japanese Government or of a superior; Article 13(a) which provided without authority of law that the technical rules of evidence (as heretofore applied by military tribunals, commissions and criminal courts) shall not be binding on the Tribunal and that the Tribunal may apply standard and rule of evidence of its own making, limited only by the views of the majority of the Tribunal as to what constituted "probative value"; Article 13(c)(1) to (5), all inclusive, which provided generally for the admission of evidence against this Petitioner by the Tribunal on innumerable occasions of hearsay and *ex parte* statements, reports, affidavits and depositions, thereby depriving the Petitioner of the ordinary right established since time immemorial to be confronted in military and criminal trials by the witnesses against him

and to be afforded an opportunity to cross-examine any witness against him; and Article 13(a) which provides that the Tribunal may take judicial notice of various matters described therein, which it did on innumerable occasions, dealing with subjects never heretofore considered by any military or judicial Tribunal as falling within the doctrine of judicial notice.

The trial conducted by such Tribunal, pursuant to the special charter, was prejudicial to your Petitioner in that the Tribunal in applying the charter rule of "probative value" summarily rejected by a majority vote hundreds upon hundreds of material and relevant documents indispensable to the defense of this Petitioner upon the charges contained in the indictment and upon which he was convicted. Very few prosecution documents were excluded from evidence.

19. Petitioner alleges that nothing contained in the Potsdam Declaration or the Japanese Instrument of Surrender authorized the trial of this Petitioner or any other so-called war criminals for acts or omissions committed prior to the beginning of the Pacific war proper on December 7, 1941; and that the Japanese Government in accepting the terms embodied in the instrument of surrender understood and intended at that time that the provision relating to the punishment of "war criminals" applied only to acts or omissions occurring in connection with the Pacific war proper after December 7, 1941.

In addition to his conviction on other counts, your Petitioner was convicted on counts 1, 27, 35 and 36, all of which relate to acts committed long prior to the beginning of the Pacific war on December 7, 1941. As the sentence of death was a single sentence applying to

all counts upon which this Petitioner was convicted, the sentence is therefore null and void.

Petitioner is informed that there were five separate opinions filed by the judges on the Tribunal representing the nations of India, Netherlands, France, Australia and Russia dissenting from the majority opinion sentencing your Petitioner to death. The jurisdiction questions presented herein were all submitted to the Tribunal and rejected.

WHEREFORE, the premises considered, Petitioner respectfully prays:

1. That this Honorable Court issue forthwith a Writ of Habeas Corpus directed to the Defendants herein, but Petitioner waives the production of his person before this Court.

2. In the alternative, that the Tribunal stay the execution of the death sentence imposed upon the Petitioner until such time as this Honorable Court is able to consider this Petition upon its merits.

3. That upon final hearing the Petitioner be discharged from the custody of the Defendants and be restored to his liberty.

4. And for such other, further and general relief as to this Honorable Court may seem just and proper.

All of which is most respectfully submitted:

KENJI DOHIHARA,
by his attorney and next friend,
William Logan, Jr.
120 Broadway,
New York City, New York.

David F. Smith
Attorney for Petitioner
Roger Smith Hotel
18th and Pennsylvania Ave. N.W.
Washington, D. C.

William Logan, Jr., of Counsel
120 Broadway
New York City, New York

JOHN G. BRANNON, of Counsel
Kansas City, Missouri

FRANKLIN E. N. WARREN, of Counsel
Oklahoma City, Oklahoma

District of Columbia, ss.:

WILLIAM LOGAN, JR., being first duly sworn according to law upon oath, deposes and says that he was a duly appointed American Defense Counsel in the major trial of alleged war criminals before the International Military Tribunal for the Far East; that the Petitioner, Kenji Dohihara, is now confined in Sugamo Prison, in Tokyo, Japan; by reason of the peculiar circumstances of the case and because of considerations of distance and time and the fact that the Petitioner is under sentence of death by hanging instanter, there has not been, and will not be, sufficient time to forward this Petition to the Petitioner for his signature and oath; that because of the foregoing, this Petition has been executed by Affiant, instead of Petitioner; that Affiant has read the foregoing Petition and upon information and belief verily believes the same to be true. Affiant further states that this Petition is filed in good faith without any purpose of delay.

William Logan, Jr.
Attorney and next friend for Petitioner,
Kenji Dohihara.

Subscribed and sworn to before me this 29th day of November, 1948.

CATHERINE C. BENSON,
Notary Public.
(Seal)

Service of a copy of the foregoing Petition for Writ of Habeas Corpus, Motion for Leave to file same, Motion for Stay of Execution, and Affidavit In *Forma Pauperis* acknowledged this 29th day of November, 1948.

PHILIP B. PERLMAN,
Solicitor General,
United States.

Motion for Stay of Execution

IN THE

SUPREME COURT OF THE UNITED STATES

Misc. No. 240

KENJI DOHIHARA, a citizen and national of Japan, appearing by his attorney and next friend, William Logan, Jr.,

Petitioner,

vs.

General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers; *et al.*,

Defendants.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes the Petitioner, KENJI DOHIHARA, by his attorney and next friend, William Logan, Jr., and moves this Honorable Court for an immediate order, based upon the annexed Petition for a Writ of Habeas Corpus, directed to the Defendants, and each of them, ordering a stay of execution of the death sentence imposed upon the Petitioner until the further order of this Court.

KENJI DOHIHARA.

By WILLIAM LOGAN, JR.,
Attorney and next friend of Petitioner,
Kenji Dohihara.

David F. Smith,
Attorney of Record for Petitioner,
Roger Smith Hotel,
18th and Pennsylvania Ave., N.W.,
Washington, D. C.

Affidavit In *Forma Pauperis*

IN THE

SUPREME COURT OF THE UNITED STATES

Misc. No. 240

KENJI DOHIHARA, a citizen and national of Japan appearing by his attorney and next friend, William Logan, Jr.,

Petitioner,

vs.

General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers; *et al.*,

Defendants.

District of Columbia, ss.:

WILLIAM LOGAN, JR., being first duly sworn according to law, upon oath deposes and says that he is a citizen of the United States, a resident of the State of New Jersey, attorney of law of the States of New York and New Jersey, that he served as American defense counsel in the major trial of alleged war criminals before the International Military Tribunal for the Far East at Tokyo, Japan, and is well acquainted with the Petitioner, Kenji Dohihara, who is now and for some time past has been imprisoned at Sugamo Prison in Tokyo, Japan; the said Kenji Dohihara has no funds or property of any kind available for the pre-payment of final payment of the costs to accrue in connection with the filing and prosecution of the annexed Petition for a Writ of Habeas Corpus; and furthermore

that any funds that Petitioner might be able to raise through friends could not be transmitted to this country under present occupation regulations.

William Logan, Jr.
120 Broadway,
New York City, New York.

Subscribed and sworn to before me this 29th day of November, 1948.

CATHERINE C. BENSON,
Notary Public.
(Seal)

LIBRARY
SUPREME COURT, U.S.

3

MOTION FILED DEC 2 1948

IN THE

Supreme Court of the United States

Misc. No. 248

KOICHI KIDO, TAKASUMI OKA, KENRYO SATO, SHIGETARO SHIMADA and SHIGENORI TOGO, citizens and nationals of Japan, appearing by their attorney and next friend, William Logan, Jr.,

Petitioners,

vs.

1. General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers. 2. Lieut. General Walton H. Walker, individually and as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan. 3. James V. Forrestal, individually and as Secretary of National Defense of the United States, and 4. Kenneth C. Royall, individually and as Secretary, Department of the Army of the United States, and 5. General Omar H. Bradley, individually and as Chief of Staff of the United States Army,

Defendants.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS, PETITION FOR WRIT OF HABEAS CORPUS AND AFFIDAVIT IN *FORMA PAUPERIS*

JOHN W. CRANDALL,
Attorney for Petitioners.

WILLIAM LOGAN, JR.,
JOHN G. BRANNON,
BEN BRUCE BLAKENEY,
JAMES N. FREEMAN,
Of Counsel.

JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084-5-6 182

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IN THE

Supreme Court of the United States

Misc. No. 248

KOICHI KIDO, TAKASUMI OKA, KENRYO SATO, SHIGETARO SHIMADA and SHIGENORI TOGO, citizens and nationals of Japan, appearing by their attorney and next friend, William Logan, Jr.,

Petitioners,

vs.

General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers; *et al.*,

Defendants.

Motion for Leave to File Annexed Petition for a Writ of Habeas Corpus on Behalf of Koichi Kido, Takasumi Oka, Kenryo Sato, Shigetaro Shimada and Shigenori Togo

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

And now come the Petitioners, KOICHI KIDO, TAKASUMI OKA, KENRYO SATO, SHIGETARO SHIMADA and SHIGENORI TOGO, by their attorney and next friend, William Logan, Jr., and by John W. Crandall, their attorney of record, and move this Honorable Court to enter an order allowing the annexed Petition for a Writ of Habeas Corpus on behalf of KOICHI KIDO, TAKASUMI OKA, KENRYO SATO,

Motion for Leave to File Annexed Petition for a Writ of Habeas Corpus on Behalf of Koichi Kido, Takasumi Oka, Kenryo Sato, Shigetaro Shimada and Shigenori Togo

SHIGETARO SHIMADA and SHIGENORI TOGO to be filed and prosecuted.

KOICHI KIDO,
TAKASUMI OKA,
KENRYO SATO,
SHIGETARO SHIMADA,
SHIGENORI TOGO.

By WILLIAM LOGAN, JR.,
Their Attorney and Next Friend.

JOHN W. CRANDALL,
Attorney of Record for Petitioners.

Petition for Writ of Habeas Corpus

IN THE

SUPREME COURT OF THE UNITED STATES

Misc. No. 248

KOICHI KIDO, TAKASUMI OKA, KENRYO SATO, SHIGETARO SHIMADA and SHIGENORI TOGO, citizens and nationals of Japan, appearing by their attorney and next friend, William Logan, Jr.,

Petitioners,

vs.

1. General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers. 2. Lieut. General Walton H. Walker, individually and as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan. 3. James V. Forrestal, individually and as Secretary of National Defense of the United States, and 4. Kenneth C. Royall, individually and as Secretary, Department of the Army of the United States, and 5. General Omar H. Bradley, individually and as Chief of Staff of the United States Army,

Defendants.

The Petitions of KOICHI KIDO, TAKASUMI OKA, KENRYO SATO, SHIGETARO SHIMADA and SHIGENORI TOGO, citizens and nationals of Japan, respectfully represent to the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States, the following:

1. The Defendant, General of the Army Douglas MacArthur is a citizen of the United States, and is sued individually and as General of the Army of the United States in the Military Occupied Territory of Japan

and in his capacity as Supreme Commander for the Allied Powers and also as a person who has the efficient custody and control of the Petitioners.

2. The Defendant, Lieut. General Walton H. Walker is a citizen of the United States and is sued individually and as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan and as a person who has the immediate custody of the Petitioners.

3. The Defendant, James V. Forrestal is a citizen of the United States, and is sued herein individually and as Secretary of National Defense of the United States and as a person who has the power to command the Defendants, General of the Army Douglas MacArthur, Lieut. General Walton H. Walker and General Omar H. Bradley.

4. The Defendant, Kenneth C. Royall is a citizen of the United States and is sued herein individually and as Secretary of the Department of the Army of the United States and also as a person who has the efficient power to control the official acts of General of the Army Douglas MacArthur, Lieut. General Walton H. Walker and General Omar H. Bradley.

5. The Defendant, General Omar H. Bradley, is a citizen of the United States and is sued herein individually and as Chief of Staff of the United States Army, serving directly under the Secretary of National Defense of the United States and the Secretary of the Department of the Army of the United States, and also as a person who has within his charge and under his authority the officers and men of the United States Army, who have within their custody and control the Petitioners herein.

6. Petitioners were arrested and taken into custody upon an order issued by the Commanding General of the United States 8th Army of Japan and confined to Sugamo Prison in Tokyo, Japan, in the latter part of 1945, and the Petitioners have been detained in said prison ever since.

7. Petitioners allege that they have been unlawfully imprisoned and restrained of their liberty continuously since the latter part of 1945 by reason of illegal actions taken by the Defendants herein, all of which will more specifically appear hereinafter.

8. On December 1, 1943, the United States of America, the Republic of China, and the United Kingdom, by the heads of their respective Governments, proclaimed as follows:

"THE CAIRO CONFERENCE

UNITED STATES OF AMERICA: PRESIDENT ROOSEVELT
CHINA: GENERALISSIMO CHIANG KAI-SHEK
UNITED KINGDOM: PRIME MINISTER CHURCHILL

Statement Released December 1, 1943

"The several military missions have agreed upon future military operations against Japan. The Three Great Allies expressed their resolve to bring unrelenting pressure against their brutal enemies by sea, land, and air. This pressure is already rising.

"The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. They covet no gain for themselves and have no thought of territorial expansion. It is their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War of 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from

all other territories which she has taken by violence and greed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent.

"With these objects in view the three Allies, in harmony with those of the United Nations at war with Japan, will continue to persevere in the serious and prolonged operations necessary to procure the unconditional surrender of Japan."

9. On July 26, 1945, a proclamation was issued by the heads of the Governments of the United States, United Kingdom, and China, known as the Potsdam Declaration, which reads as follows:

"POTSDAM DECLARATION

PROCLAMATION BY HEADS OF GOVERNMENTS, UNITED STATES, UNITED KINGDOM, AND CHINA

"(1) We—the President of the United States, the President of the National Government of the Republic of China, and the Prime Minister of Great Britain, representing the hundreds of millions of our countrymen, have conferred and agree that Japan shall be given an opportunity to end this war.

"(2) The prodigious land, sea and air forces of the United States, the British Empire and of China, many times reinforced by their armies and air fleets from the west, are poised to strike the final blows upon Japan. This military power is sustained and inspired by the determination of all the Allied Nations to prosecute the war against Japan until she ceased to resist.

"(3) The result of the futile and senseless German resistence to the might of the aroused free peoples of the world stands forth in awful clarity as an example to the people of Japan. The might that now converges on Japan is immeasurably greater than that which,

when applied to the resisting Nazis, necessarily laid waste to the lands, the industry and the methods of life of the whole German people. The full application of our military power, backed by our resolve, *will* mean the inevitable and complete destruction of the Japanese armed forces and just as inevitably the utter devastation of the Japanese homeland.

"(4) The time has come for Japan to decide whether she will continue to be controlled by those self-willed militaristic advisers whose unintelligent calculations have brought the Empire of Japan to the threshold of annihilation, or whether she will follow the path of reason.

"(5) *Following are our terms.* We will not deviate from them. There are no alternatives. We shall brook no delay.

"(6) There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.

"(7) Until such a new order is established *and* until there is convincing proof that Japan's war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objectives we are here setting forth.

"(8) The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.

"(9) The Japanese military forces, after being completely disarmed, shall be permitted to return to their homes with the opportunity to lead peaceful and productive lives.

"(10) We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, includ-

ing those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights, shall be established.

"(11) Japan shall be permitted to maintain such industries as will sustain her economy and permit the exaction of just reparations in kind, but not those which would enable her to re-arm for war. To this end, access to, as distinguished from control of, raw materials shall be permitted. Eventual Japanese participation in world trade relations shall be permitted.

"(12) The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished and there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government.

"(13) We call upon the government of Japan to proclaim now the unconditional surrender of all Japanese armed forces, and to provide proper and adequate assurances of their good faith in such action. The alternative for Japan is prompt and utter destruction."

10. On September 2, 1945, on board the *U. S. S. Missouri* an instrument of surrender on behalf of the Japanese Empire was signed and which reads as follows:

"INSTRUMENT OF SURRENDER

"We, acting by command of and in behalf of the Emperor of Japan, the Japanese Government and the Japanese Imperial General Headquarters, hereby accept the provisions set forth in the declaration issued by the heads of the Governments of the United States, China, and Great Britain on 26 July 1945 at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics, which four powers are hereafter referred to as the Allied Powers.

"We hereby proclaim the unconditional surrender to the Allied Powers of the Japanese Imperial General Headquarters and of all Japanese armed forces and all armed forces under Japanese control wherever situated.

"We hereby command all Japanese forces wherever situated and the Japanese people to cease hostilities forthwith, to preserve and save from damage all ships, aircraft, and military and civil property and to comply with all requirements which may be imposed by the Supreme Commander for the Allied Powers or by agencies of the Japanese Government at his direction.

"We hereby command the Japanese Imperial General Headquarters to issue at once orders to the Commanders of all Japanese forces and all forces under Japanese control wherever situated to surrender unconditionally themselves and all forces under their control.

"We hereby command all civil, military and naval officials to obey and enforce all proclamations, orders and directives deemed by the Supreme Commander for the Allied Powers to be proper to effectuate this surrender and issued by him or under his authority and we direct all such officials to remain at their posts and to continue to perform their non-combatant duties unless specifically relieved by him or under his authority.

"We hereby undertake for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever action may be required by the Supreme Commander for the Allied Powers or by any other designated representative of the Allied Powers for the purpose of giving effect to that Declaration.

"We hereby command the Japanese Imperial Government and the Japanese Imperial General Headquarters at once to liberate all allied prisoners of war and civilian internees now under Japanese control and to provide for their protection, care, maintenance and immediate transportation to places as directed.

"The authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender.

"Signed at Tokyo Bay, Japan, at 0904 on the Second day of September, 1945.

"MAMORU SHIGEMITSU
By Command and in behalf of the Emperor of Japan and the Japanese Government.

YOSHIJIRO UMEZU
By Command and in behalf of the Japanese Imperial General Headquarters.

"Accepted at Tokyo Bay, Japan at 0908 on the Second day of September, 1945 for the United States, Republic of China, United Kingdom and the Union of Soviet Socialist Republics, and in the interests of the other United Nations at war with Japan.

DOUGLAS MACARTHUR
Supreme Commander for the Allied Powers

"C. W. NIMITZ
United States
Representative

HSU YUNG-CHANG
Republic of China
Representative

BRUCE FRASER
United Kingdom
Representative

LIEUTENANT GENERAL
K. DEREVYANKO
Union of Soviet
Socialist Republics
Representative

T. A. BLAMEY
Commonwealth of
Australia
Representative

L. MOORE COSGRANE
Dominion of Canada
Representative

LE CLERC
Provisional Government of
the French Republic
Representative

C. E. L. HELFRICH
Kingdom of the Netherlands
Representative

LEONARD M. ISITT
Dominion of New Zealand Representative"

11. On September 2, 1945, the following proclamation was issued by the Emperor of Japan:

"PROCLAMATION BY THE EMPEROR OF JAPAN

"Accepting the terms set forth in the Declaration issued by the heads of the Governments of the United States, Great Britain and China on July 26, 1945, at Potsdam and subsequently adhered to by the Union of Soviet Socialist Republics, I have commanded the Japanese Imperial Government and the Japanese Imperial General Headquarters to sign on my behalf the instrument of surrender presented by the Supreme Commander for the Allied Powers and to issue General Orders to the Military and Naval forces in accordance with the direction of the Supreme Commander for the Allied Powers. I command all my people forthwith to cease hostilities, to lay down their arms and faithfully to carry out all the provisions of the instrument of surrender and the General Orders issued by the Japanese Imperial General Headquarters thereunder."

12. On January 19, 1946, the Defendant, General of the Army Douglas MacArthur, acting in his capacity as General of the Army of the United States and Supreme Commander for the Allied Powers, issued a special proclamation at Tokyo, Japan, for the establishment of an International Military Tribunal for the Far East, which reads as follows:

"SPECIAL PROCLAMATION

ESTABLISHMENT OF AN INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

"WHEREAS, the United States and the Nations allied therewith in opposing the illegal wars of aggression of the Axis Nations, have from time to time made declarations of their intentions that war criminals should be brought to justice;

"WHEREAS, the Governments of the Allied Powers at war with Japan on the 26th July 1945 at Potsdam, declared as one of the terms of surrender that stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners;

"WHEREAS, by the Instrument of Surrender of Japan executed at Tokyo Bay, Japan, on the 2nd September 1945, the signatories for Japan, by command of and in behalf of the Emperor and the Japanese Government accepted the terms set forth in such Declaration at Potsdam;

"WHEREAS, by such Instrument of Surrender, the authority of the Emperor and the Japanese Government to rule the state of Japan is made subject to the Supreme Commander for the Allied Powers, who is authorized to take such steps as he deems proper to effectuate the terms of surrender;

"WHEREAS, the undersigned has been designated by the Allied Powers as Supreme Commander for the Allied Powers to carry into effect the general surrender of the Japanese armed forces.

"WHEREAS, the Governments of the United States, Great Britain and Russia at the Moscow Conference, 26th December 1945, having considered the effectuation by Japan of the Terms of Surrender, with the concurrence of China have agreed that the Supreme Commander shall issue all Orders for the implementation of the Terms of Surrender.

"NOW, THEREFORE, I, Douglas MacArthur, as Supreme Commander for the Allied Powers, by virtue of the authority so conferred upon me, in order to implement the Term of Surrender which requires the meting out of stern justice to war criminals, do order and provide as follows:

"ARTICLE 1. There shall be established an international Military Tribunal for the Far East for the trial of those persons charged individually, or as members

of organizations, or in both capacities, with offenses which include crimes against peace.

"ARTICLE 2. The Constitution, jurisdiction and functions of this Tribunal are those set forth in the Charter of the International Military Tribunal for the Far East, approved by me this day.

"ARTICLE 3. Nothing in this Order shall prejudice the jurisdiction of any other international, national or occupation court, commission or other tribunal established or to be established in Japan or in any territory of a United Nation with which Japan has been at war, for the trial of war criminals.

"Given under my hand at Tokyo, this 19th day of January, 1946.

DOUGLAS MACARTHUR,
General of the Army, United States Army
Supreme Commander for the Allied Powers."

13. On April 26, 1946, General of the Army Douglas MacArthur issued General Orders No. 20, amending General Orders No. 1; which promulgated the Charter of the International Military Tribunal for the Far East as follows:

"GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS

APO 500
26 April 1946

GENERAL ORDERS
No. 20

"General Orders No. 1, General Headquarters, Supreme Command for the Allied Powers, 19 January 1946, subject as below, is superseded. The Charter of the International Military Tribunal for the Far East

established by Proclamation of the Supreme Commander for the Allied Powers, 19 January 1946, is amended, and as amended, reads as follows:

"CHARTER OF THE
INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST

SECTION I

CONSTITUTION OF TRIBUNAL

"ARTICLE 1. *Tribunal Established.* The International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo.

"ARTICLE 2. *Members.* The Tribunal shall consist of not less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines.

"ARTICLE 3. *Officers and Secretariat.*

"a. *President.* The Supreme Commander for the Allied Powers shall appoint a Member to be President of the Tribunal.

"b. *Secretariat.*

"(1) The Secretariat of the Tribunal shall be composed of a General Secretary to be appointed by the Supreme Commander for the Allied Powers and such assistant secretaries, clerks, interpreters, and other personnel as may be necessary.

"(2) The General Secretary shall organize and direct the work of the Secretariat.

"(3) The Secretariat shall receive all documents addressed to the Tribunal, main-

tain the records of the Tribunal, provide necessary clerical services to the Tribunal and its members, and perform such other duties as may be designated by the Tribunal.

"ARTICLE 4. *Convening and Quorum, Voting and Absence.*

"a. *Convening and Quorum.* When as many as six members of the Tribunal are present, they may convene the Tribunal in formal session. The presence of a majority of all members shall be necessary to constitute a quorum.

"b. *Voting.* All decisions and judgments of this Tribunal, including convictions and sentences, shall be by a majority vote of those members of the Tribunal present. In case the votes are evenly divided, the vote of the President shall be decisive.

"c. *Absence.* If a member at any time is absent and afterwards is able to be present, he shall take part in all subsequent proceedings; unless he declares in open court that he is disqualified by reason of insufficient familiarity with the proceedings which took place in his absence.

"SECTION II

JURISDICTION AND GENERAL PROVISIONS

"ARTICLE 5. *Jurisdiction Over Persons and Offenses.* The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

"a. *Crimes against Peace*: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances,

or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

"b. *Conventional War Crimes*: Namely, violations of the laws or customs of war;

"c. *Crimes against Humanity*: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or prosecutions on political or racial grounds in execution of or in connection wth any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

"ARTICLE 6. *Responsibility of Accused.* Neither the official position, at any time, of any accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

"ARTICLE 7. *Rules of Procedure.* The Tribunal may draft and amend rules of procedure consistent with the fundamental provisions of this Charter.

"ARTICLE 8. *Counsel.*

"a. *Chief of Counsel.* The Chief of Counsel designated by the Supreme Commander for the Allied Powers is responsible for the investigation and prosecution of charges against war criminals within the jurisdiction of this Tribunal and will render such legal assistance to the Supreme Commander as is appropriate.

"b. *Associate Counsel.* Any United Nation with which Japan has been at war may appoint an Associate Counsel to assist the Chief of Counsel.

"SECTION III

"FAIR TRIAL FOR ACCUSED

"ARTICLE 9. *Procedure for Fair Trial.* In order to insure fair trial for the accused the following procedure shall be followed:

"a. *Indictment.* The indictment shall consist of a plain, concise, and adequate statement of each offense charged. Each accused shall be furnished, in adequate time for defense, a copy of the indictment, including any amendment, and of this Charter, in a language understood by the accused.

"b. Language. The trial and related proceedings shall be conducted in English and in the language of the accused. Translations of documents and other papers shall be provided as needed and requested.

"c. *Counsel for Accused.* Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial.

"d. *Evidence for Defense.* An accused shall have the right, through himself or through his counsel (but not through both), to conduct his defense, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine.

"e. *Production of Evidence for the Defense.* An accused may apply in writing to the Tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located. It shall also state the facts proposed to be proved by the witness or the document and the relevancy of such facts to the defense. If the

Tribunal grants the application the Tribunal shall be given such aid in obtaining production of the evidence as the circumstances require.

"ARTICLE 10. *Applications and Motions before Trial.* All motions, applications, or other requests addressed to the Tribunal prior to the commencement of trial shall be made in writing and filed with the General Secretary of the Tribunal for action by the Tribunal.

"SECTION IV

POWERS OF TRIBUNAL AND CONDUCT OF TRIAL

ARTICLE 11. *Powers.* The Tribunal shall have the power:

"a. To summon witnesses to the trial, to require them to attend and testify, and to question them.

"b. To interrogate each accused and to permit comment on his refusal to answer any questions.

"c. To require the production of documents and other evidentiary material.

"d. To require of each witness an oath, affirmation, or such declaration as is customary in the country of the witness, and to administer oaths.

"e. To appoint officers for the carrying out of any task designated by the Tribunal, including the power to have evidence taken on commission.

"ARTICLE 12. *Conduct of Trial.* The Tribunal shall:

"a. Confine the trial strictly to an expeditious hearing of the issues raised by the charges.

"b. Take strict measures to prevent any action which would cause any unreasonable delay and rule out irrelevant issues and statements of any kind whatsoever.

"c. Provide for the maintenance of order at the trial and deal summarily with any contumacy, imposing

appropriate punishment, including exclusion of any accused or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

"d. Determine the mental and physical capacity of any accused to proceed to trial.

"ARTICLE 13. *Evidence.*

"a. *Admissibility.* The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure; and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible.

"b. *Relevance.* The Tribunal may require to be informed of the nature of any evidence before it is offered in order to rule upon the relevance.

"c. *Specific evidence admissible.* In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

"(1) A document, regardless of its security classification and without proof of its issuance or signature, which appears to the Tribunal to have been signed or issued by any officer, department, agency or member of the armed forces of any government.

"(2) A report which appears to the Tribunal to have been signed or issued by the International Red Cross or a member thereof, or by a doctor of medicine or any medical service personnel, or by an investigator or intelligence officer, or by any other person who appears to the Tribunal to have personal knowledge of the matters contained in the report.

"(3) An affidavit, deposition or other signed statement.

"(4) A diary, letter or other document, including sworn or unsworn statements, which appear to the Tribunal to contain information relating to the charge.

"(5) A copy of a document or other secondary evidence of its contents, if the original is not immediately available.

"d. *Judicial Notice.* The Tribunal shall neither require proof of facts of common knowledge, nor of the authenticity of official government documents and reports of any nation nor of the proceedings, records, and findings of military or other agencies of any of the United States.

"e. *Records, Exhibits, and Documents.* The transcript of the proceedings, and exhibits and documents submitted to the Tribunal, will be filed with the General Secretary of the Tribunal and will constitute part of the Record.

"ARTICLE 14. *Place of Trial.* The first trial will be held at Tokyo, and any subsequent trials will be held at such places as the Tribunal decides.

"ARTICLE 15. *Course of Trial Proceedings.* The proceedings at the Trial will take the following course:

"a. The indictment will be read in court unless the reading is waived by all accused.

"b. The Tribunal will ask each accused whether he pleads 'guilty' or 'not guilty.'

"c. The prosecution and each accused (by counsel only, if represented) may make a concise opening statement.

"d. The prosecution and defense may offer evidence, and the admissibility of the same shall be determined by the Tribunal.

"e. The prosecution and each accused (by counsel only, if represented) may examine each witness and each accused who gives testimony.

"f. Accused (by counsel only, if represented) may address the Tribunal.

"g. The prosecution may address the Tribunal.

"h. The Tribunal will deliver judgment and pronounce sentence.

"SECTION V

JUDGMENT AND SENTENCE

"ARTICLE 16. *Penalty.* The Tribunal shall have the power to impose upon an accused, on conviction, death, or such other punishment as shall be determined by it to be just.

"ARTICLE 17. *Judgment and Review.* The judgment will be announced in open court and will give the reasons on which it is based. The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action. Sentence will be carried out in accordance with the Order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence, except to increase its severity.

"By command of General MacArthur:

"RICHARD J. MARSHALL
Major General, General Staff Corps,
Chief of Staff

OFFICIAL:

/s/ B. M. Fitch
B. M. FITCH,
Brigadier General, AGD,
Adjutant General."

14. On February 15, 1946, General of the Army Douglas MacArthur, acting on behalf of 11 governments comprising the Allied Powers, including the Government

of the United States of America, appointed nominees of each of the Allied Powers to act as judges on the International Military Tribunal for the Far East, and in a trial thereafter conducted by said Tribunal, as hereinafter set forth, General of the Army Douglas MacArthur substituted another judge as the nominee of the United States after the trial had been in progress approximately three months. Two of the judges so appointed were military officers in active service of the countries which nominated them.

15. Petitioner, KOICHI KIDO, never held a military office or position at any tme. He served as Chief Secretary to the Lord Keeper of the Privy Seal from 1930 to 1936, a member of the cabinet as Education Minister, Welfare Minister and Home Minister from October 22, 1937 to August, 1939, and Lord Keeper of the Privy Seal from June 1, 1940 to September 2, 1945. As Lord Keeper of the Privy Seal, his chief duty was to consult with the Emperor and keep him advised on current affairs. Petitioner, TAKASUMI OKA, was an officer in the Japanese Navy. In October, 1940, he was promoted to Rear Admiral, Chief of the Naval Affairs Bureau of the Navy Ministry, which office he held until July, 1944. Petitioner, KENRYO SATO, was appointed Chief of the Military Affairs Section of the Military Affairs Bureau in February, 1941. He was promoted to Major General in October, 1941, and in April, 1942, he became Chief of the Military Affairs Bureau, which position he held until 1944. Petitioner, SHIGETARO SHIMADA, was an Admiral in the Japanese Navy and was appointed Navy Minister pursuant to seniority ratings on October 17, 1941, which position he held under the TOJO cabinet. Petitioner, SHIGENORI TOGO, was a career diplomat. He never held any military office or position

at any time. He served as Foreign Minister from October 17, 1941 until September 1942 when he resigned. He played no part in public life again until he became Foreign Minister in the SUZUKI cabinet of 1945. The Tribunal found that up to his resignation in 1942, your Petitioner SHIGENORI TOGO "endeavored to see to the observation of the rules of war", passing on such protests as came to him for investigation and in several instances remedial measures were taken."

16. The International Military Tribunal for the Far East conducted a trial under an indictment returned pursuant to the terms of the aforesaid charter, to which indictment your Petitioners pleaded "not guilty." The Tribunal took evidence for a period of approximately two years and on November 12, 1948, the Tribunal by a majority finding and judgment found all your Petitioners guilty of "crimes against peace" under Counts 1, 27, 29, 31 and 32 of the indictment. They were all found not guilty on all counts against them in the indictment charging "conventional war crimes" and "crimes against humanity." The counts charging "crimes against peace" upon which your Petitioners were convicted read as follows:

"Count 1

"All the accused together with other persons, between the 1st January, 1928, and the 2nd September, 1945, participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy, and are responsible for all acts performed by any person in execution of such plan.

"The object of such plan or conspiracy was that Japan should secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and of all countries bordering

thereon and islands therein, and for that purpose they conspired that Japan should alone or in combination with other countries having similar objects, or who could be induced or coerced to join therein, wage declared or undeclared war or wars of aggression, and war or wars in violation of international law, treaties, agreements and assurances, against any country or countries which might oppose that purpose.

"The whole of the Particulars in Appendix A, of the Treaty Articles in Appendix B, and of the Assurances in Appendix C, relate to this Count."

"Count 27

"All the accused, between the 18th September, 1931, and the 2nd September, 1945, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Republic of China.

"The same Particulars, Treaty Articles and Assurances as in Count 2, relate to this Count."

"Count 29

"All the accused, between the 7th December, 1941, and the 2nd September, 1945, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the United States of America.

"The following Sections of the Particulars in Appendix A; Nos. 4 to 10 inclusive; and the same Treaty Articles and Assurances as in Count 20, relate to this Count."

"Count 31

"All the accused, between the 7th December, 1941, and the 2nd September, 1945, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the British Commonwealth of Nations.

"The following Sections of the Particulars in Appendix A; Nos. 4 to 10 inclusive; and the same Treaty, Articles and Assurances as in Count 22, relate to this Count."

"Count 32

"All the accused, between the 7th December, 1941, and the 2nd September, 1945, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Kingdom of the Netherlands.

"The same Particulars, Treaty Articles and Assurances as in Count 14, relate to this Count."

17. Pursuant to the finding and judgment of guilt by the International Military Tribunal for the Far East under the aforesaid indictment, the Tribunal sentenced all of your Petitioners to life imprisonment except your Petitioner, SHIGENORI TOGO, who was sentenced to serve twenty years in prison. Thereafter, within the period of one week allowed for an appeal by the General of the Army Douglas MacArthur, Petitioners did appeal citing various errors committed by the Tribunal during the course and proceedings of the trial.

18. On or about November 23, 1948, the defendant, General of the Army Douglas MacArthur denied the appeals of the Petitioners and issued an order commanding the defendant, Lieut. General Walton H. Walker, as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan, to carry out the sentence as "pronounced by the Tribunal" as approved and affirmed by General of the Army Douglas MacArthur and Supreme Commander for the Allied Powers. Petitioners allege that they will be confined to prison under the aforesaid sentence unless afforded relief by this Honorable Court.

19. Your Petitioners allege that this Honorable Court has jurisdiction to issue the writ of Habeas Corpus requested herein and grant the relief sought under §§ 451 to 462, inclusive, of Title 28 of the United States Code, under the constitution, treaties, international engagements and laws of the United States. Petitioners, and each of them, are at the present time, and have been during their lengthy trial, imprisoned in Sugamo Prison, in Tokyo, Japan, solely within the custody, control and by color of the authority of officers and men of the United States Army. Petitioners, and each of them, are unjustly and unlawfully being so held, detained and deprived of their liberty and freedom, against their will and wishes and in violation of the Constitution and laws of the United States of America as will hereinafter be shown. Petitioners, and each of them, are in custody, as aforesaid, under and by color of authority of the United States. They were committed to trial before a tribunal constituted and created under color of the authority of the United States. Being subjects and citizens of a foreign state and domiciled therein, they are in custody for acts done or omitted to be done which they claim as legal and non-criminal by virtue of a right, privilege and protection growing out of and depending upon the Law of Nations. Petitioners, and each of them, at various times during the period set forth in the Indictment were holders of governmental positions, either civil or military, and as such were members of the Japanese Government. The said KOICHI KIDO and SHIGENORI TOGO were civilians and not members of the military or occupying any military position. The said TAKASUMI OKA, KENRYO SATO and SHIGETARO SHIMADA were members of the armed forces of Japan. The acts of petitioners, and each of them,

for which complaint was made and charges brought, were acts taken by them in their capacity as members of the Government of Japan. Insofar as their conduct and actions pertaining to the decision of the sovereign nation of Japan to resort to or wage war is concerned, petitioners, and each of them, were entitled to rely and depend upon the existing Law of Nations as the basis for the validity of said actions so taken. Upon these premises and upon further recital hereinafter to be made, the invoking of jurisdiction to this Honorable Court is prayed.

20. The International Military Tribunal for the Far East although allegedly an international juridical body dispensing and adhering to existing and established international law, was initially and is in reality a creation and enterprise of the Executive of the United States and the Military authorities thereunder. The Tribunal and Charter thereof were created by General of the Army Douglas MacArthur, of the Army of the United States, and Supreme Commander for the Allied Powers, solely under instruction and directive from the Joint Chiefs of Staff of the United States Armed Forces. Pursuant to and in accordance with the instruction and directive from the Joint Chiefs of Staff as aforesaid, on the 19th day of January, 1946, the said General Douglas MacArthur issued the aforesaid Special Proclamation establishing the Tribunal itself and at the same time promulgated the Charter in which is contained the enumeration and definition of the offenses under which these petitioners, and each of them, were subsequently subjected to trial.

21. The law enunciating the offenses as set forth in said Charter was binding on said Tribunal, voiding effective

adjudication of the validity of said offenses as existing international law, and was of the force and effect of a constitutional provision or legislative enactment. The promulgation of the law in said Charter bound the Tribunal to administer said law as set forth by the said General of the Army Douglas MacArthur, and to do so regardless of the source or validity of its creation. Insofar as the various offenses contained in the Charter are concerned these petitioners, and each of them, being convicted, as aforesaid, only of those offenses described as *Crimes against Peace*, the scope of this petition does not bring into issue the other offenses named. The definition of *Crimes against Peace* contained in said Charter is as follows:

> "*Crimes against Peace.* Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."

The alleged offense of *Crimes against Peace* as defined in the said Charter of said Tribunal is not and was never international law for which individual liability was recognized. Such never existed as an offense in the courts, civil or military, of the United States, and such never existed as an offense in the courts, civil or military, of any other nation of the world.

22. The creation of said offense of *Crimes against Peace*, in the manner and means before set out, was in violation of the express provisions of the Constitution of the United States. The Constitution of the United States provides that the Congress shall define and punish for Offenses against the Law of Nations. (Article 1, Section 8, Clause 10.) The Congress has never

defined such a crime, either directly or indirectly, or by any other means, as an offense against the law of Nations. The legislative power of the United States could not have been and was not delegated to the Executive or the military authorities thereunder; and hence the action of the said General of the Army Douglas MacArthur in so setting forth and defining *Crimes against Peace* as an offense for which individual liability could attach was inconsistent with the precise terms of the Constitution of the United States and without the scope of his lawful power or authority. The Far Eastern Commission created at the Moscow Conference on December 26, 1945, by Executive Agreement between the foreign ministers of the United States, the United Kingdom, the Union of Soviet Socialist Republics, in concurrence with China, and whose function was to formulate the policies, principles and standards in conformity with which the fulfillment by Japan of its obligations under the Terms of Surrender might be accomplished, issued no directive to General of the Army Douglas MacArthur as Supreme Commander for the Allied Powers regarding the creation of the said International Military Tribunal for the Far East or the establishment of the law under which it was to function until April, 1946, some months after said Tribunal and Charter were proclaimed under solely American direction and authority as heretofore set forth. The creation of said Tribunal and Charter was not the result of international treaty and the constitutional provisions reserving to the Congress of the United States the power, as aforesaid, prohibited and rendered nugatory the action so taken by the Executive of the United States and the military authorities thereunder.

23. The Executive of the United States and the military authorities thereunder, being legally incapable of es-

tablishing *Crimes against Peace* as an offense under the Law of Nations insofar as the United States is concerned, cannot establish such an offense against the Law of Nations insofar as the entire family of nations is concerned. Such action of the Executive or military authorities thereunder, whether taken on behalf of the United States alone or in conjunction and cooperation with other nations, remains completely without the sanction of constitutionality.

24. The Constitution and laws of the United States do not permit the Executive of the United States or the military authorities thereunder to create, or participate in the creation of, a national or international military court or tribunal which asserts jurisdiction to try and punish for offenses other than those within the category of the law of war. The said *Crimes against Peace* are admittedly not encompassed within the law of war and hence the actions taken by the Executive or military authorities thereunder in the creation, or participation in the creation of the International Military Tribunal for the Far East are unconstitutional and void.

25. The action of the Executive or military authorities thereunder in creating or participating in the creation of said International Military Tribunal for the Far East and the creation or participation in the creation of the announcement of law contained in said Charter thereof, being without the dignity of treaty as its basis, was further unconstitutional and void in that it infringes upon the power and right of the Congress of the United States and the individual members thereof to decide when a given factual situation demands resort by the United States to a war in self-defense. The right of the Congress of the United States and the

individual members thereof to rely upon pre-existing international law, and especially that contained and expressed in the notes of the United States accompanying the execution and ratification of the Pact of Paris of 1928 regarding the question of resort to war in self-defense, is usurped by the Executive and military commitment of the United States to participate in the International Military Tribunal for the Far East. The majority ruling of said Tribunal, adhered to by the American Justice thereof, decreed,

"The right of self-defense does not confer upon the State resorting to war the authority to make a final determination upon the justification for its action."

26. The Constitution of the United States which delegates to the Congress of the United States the right to define and punish for Offenses against the Law of Nations also expressly prohibits the enactment of *ex post facto* laws. The alleged offense of *Crimes against Peace* was set forth, defined, and made punishable for the first time after the perpetration of the alleged acts of petitioners herein and hence is *ex post facto* in nature. The Executive and the military authorities thereunder in creating, or participating in the creation of, such *ex post facto* legislation did that which even the Congress of the United States could not do and hence acted without the sanction of constitutionality and to the injury and prejudice of these petitioners, and each of them.

27. The action of the said General of the Army, Douglas MacArthur in creating and proclaiming the International Military Tribunal for the Far East and the Charter thereof was further unconstitutional and void in that from the language of said Proclamation itself

the petitioners, and each of them, were deprived of a fair and impartial trial. In the first sentence of said Proclamation are contained the words:

"WHEREAS, the United States and the Nations allied therewith in opposing the illegal wars of aggression of the Axis Nations * * *."

Japan being a member of the Axis Nations and the petitioners herein being connected with the Japanese Government, said statement of the Supreme Commander for the Allied Powers foreclosed the issue, insofar as the Tribunal was concerned, of whether Japan waged an aggressive war. The Charter of the Tribunal created in conjunction with this Proclamation, as aforesaid, declares aggressive war to be a crime for which individual liability attaches. The Proclamation of General Douglas MacArthur, Supreme Commander for the Allied Powers, in creating said Tribunal was the source of life for said Tribunal and its utterances binding upon them. The Charter of said Tribunal was likewise binding upon said Tribunal, as aforesaid. Petitioners show to this Honorable Court that because these two determinations were pre-imposed upon the Tribunal, to wit, (1) that Japan waged an aggressive war, and, (2) that aggressive war is a crime, the said Tribunal was relegated to a mere fact-finding body with inquiry confined to the participation of these petitioners in the governmental affairs of their country during the period set forth in the Indictment.

28. The Justices of the said International Military Tribunal for the Far East were all citizens and subjects of nations at war with Japan. Although said Justices were acting in their individual capacity and pur-

portedly governed by their own discretion insofar as the Charter of the said Tribunal permitted, their respective governments, having politically decided and declared Japan to have been guilty of waging aggressive war, said Justices were prevented from exercising impartial and unprejudiced views, to the injury and prejudice of petitioners.

29. Petitioners were further deprived of a fair and impartial trial in that at the commencement of said trial the Tribunal refused to allow challenges for cause to be made to the individual members of said Tribunal, giving as reason therefor that the constitution of the Tribunal and appointment of the respective justices thereof had been directed by General Douglas MacArthur, Supreme Commander for the Allied Powers, and, hence, foreclosed the right of the Defense to challenge the capacity of the members of said Tribunal. The right to challenge a judge for cause is possessed by all defendants triable before courts of the United States, either civil or military.

30. The Potsdam Declaration of July 20, 1945, promised that,

"Stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners."

The Instrument of Surrender of September 2, 1945, adhering to the terms of the Potsdam Declaration, did not foreclose the right of these petitioners, and each of them, as subjects of a sovereign nation, to rely upon and demand the right of trial based upon existing international law. Said agreement above referred to, or any other agreements executed by and between the nations allied in war against Japan, did not and could

not deprive these petitioners, and each of them, of their pre-existing rights under international law. The creation of the category of offenses known as *Crimes against Peace* by the Executive of the United States or the military authorities thereunder, or the participation in the creation of same, was in violation of existing international law, in violation of the laws and constitution of the United States and to the injury and prejudice of these petitioners.

31. Not only was the Tribunal and Charter created by American authority and direction alone, as aforesaid, but the Chief of Counsel in full charge of the prosecution of said case against petitioners was supplied by the United States and is a citizen of the United States. One of the members of said Tribunal was supplied by the United States, and is a citizen of the United States, and the others, although citizens and subjects of other allied nations, were appointed by said General of the Army, Douglas MacArthur, a citizen of the United States, under the direction and color of authority as aforesaid of the Joint Chiefs of Staff of the United States. Petitioners have been at all times during the pendency of the trial and at the present time are in the sole custody of officers and men of the Armed Forces of the United States, as aforesaid. The jurisdictional questions presented herein were raised at various times during the course of the trial and were rejected by the Tribunal.

WHEREFORE, petitioners respectfully pray:

(a) That in its deliberation on the allowance of original jurisdiction to hear this petition for *habeas corpus*, this Honorable Court fully consider the exigency of the occa-

sion, the unprecedented and unparalleled nature of the subject matter, the vital and momentous constitutional questions brought into issue and the need for judicial determination of the right and power of the Executive and military authorities thereunder to act as hereinbefore set out.

(b) That this Honorable Court declare and decree that the acts done and the steps taken by the Executive of the United States and military authorities thereunder as herein complained of are unconstitutional and void,

(c) That pending the submission of a supporting brief to this petition and the preparation of argument in its behalf, this Honorable Court order and require the defendants herein named to direct and command General of the Army Douglas MacArthur to withhold any action contemplated in the carrying out of the sentences imposed upon your petitioners by the International Military Tribunal for the Far East until further order of this Honorable Court,

(d) That defendants be directed to afford counsel the necessary facilities for the furtherance of this action before this Honorable Court,

(e) That the original jurisdiction of this Court be invoked in this cause and that upon final determination of the issues herein raised writs of *habeas corpus* be issued to the defendants herein named, and each of them, but petitioners waive the production of their persons before this Honorable Court.

(f) And that this Honorable Court issue such further orders and render such relief as deemed necessary the premises considered.

All of which is most respectfully submitted.

KOICHI KIDO

TAKASUMI OKA

KENRYO SATO

SHIGETARO SHIMADA

SHIGENORI TOGO

by their attorney and next friend
WILLIAM LOGAN, JR.
120 Broadway
New York 5, New York

JOHN W. CRANDALL
Attorney for Petitioners
120 Broadway, New York 5, New York

WILLIAM LOGAN, JR., 120 Broadway, New York 5, New York,

JOHN G. BRANNON, War Ministry Building, Tokyo, Japan,

BEN BRUCE BLAKENEY, War Ministry Building, Tokyo, Japan,

JAMES N. FREEMAN, War Ministry Building, Tokyo, Japan,

of Counsel.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

WILLIAM LOGAN, JR., being first duly sworn, according to law, upon oath, deposes and says that he was a duly appointed American Defense Counsel in the major trial of alleged war criminals before the International Military

Tribunal for the Far East; that the Petitioners, Koichi Kido, Takasumi Oka, Kenryo Sato, Shigetaro Shimada and Shigenori Togo, are now confined in Sugamo Prison, in Tokyo, Japan; by reason of the peculiar circumstances of the case and because of considerations of distance and time, there has not been, and will not be, sufficient time to forward this Petition to the Petitioners, for their signature and oath; that because of the foregoing, this Petition has been executed by Affiant, instead of Petitioners; that Affiant has read the foregoing Petition and upon information and belief verily believes the same to be true. Affiant further states that this Petition is filed in good faith without any purpose of delay.

William Logan, Jr., Attorney and next friend for Petitioners, Koichi Kido, Takasumi Oka, Kenryo Sato, Shigetaro Shimada and Shigenori Togo.

Subscribed and sworn to before me this first day of December, 1948.

Robert M. Donohue
Attorney and Counsellor-at-Law
120 Broadway, New York 5, N. Y.
Residing & Apptd. in Westchester Co.
Certificates filed in
N. Y. Co. Clk. No. 601, Reg. No. A545-D-9
Bronx Co. Clk. No. 1, Reg. No. A-190-D-9
Commission Expires March 30, 1949

Affidavit In *Forma Pauperis*

IN THE

SUPREME COURT OF THE UNITED STATES

Misc. No. 248

KOICHI KIDO, TAKASUMI OKA, KENRYO SATO, SHIGETARO SHIMADA and SHIGENORI TOGO, citizens and nationals of Japan, appearing by their attorney and next friend, William Logan, Jr.,

Petitioners,

vs.

General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers; *et al.*,

Defendants.

State of New York, }
County of New York, } ss.:

WILLIAM LOGAN, JR., being first duly sworn according to law, upon oath deposes and says that he is a citizen of the United States, a resident of the State of New Jersey, attorney of law of the States of New York and New Jersey, that he served as American defense counsel in the major trial of alleged war criminals before the International Military Tribunal for the Far East at Tokyo, Japan, and is well acquainted with the Petitioners, Koichi Kido, Takasumi Oka, Kenryo Sato, Shigetaro Shimada and Shigenori Togo, who are now and for some time past have been imprisoned at Sugamo Prison in Tokyo, Japan; the said petitioners Koichi Kido, Takasumi Oka, Kenryo Sato,

Affidavit in Forma Pauperis

Shigetaro Shimada and Shigenori Togo, have no funds or property of any kind available for the pre-payment or final payment of the costs to accrue in connection with the filing and prosecution of the annexed Petition for a Writ of Habeas Corpus; and furthermore that any funds the petitioners might be able to raise through friends could not be transmitted to this country under present occupation regulations.

WILLIAM LOGAN, JR.,
120 Broadway,
New York 5, New York.

Subscribed and sworn to before me this
1st day of December, 1948.

HELEN F. TUOHY
Attorney & Counsellor at Law
120 Broadway, New York, N. Y.
Residing in New York County
N. Y. Co. Clk's No. 52, Reg. No. A62-T-0
Commission Expires March 30, 1950

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 239 Misc.

KOKI HIROTA, A CITIZEN AND NATIONAL OF JAPAN, APPEARING BY HIS ~~ATTORNEY AND NEXT FRIEND~~, DAVID F. SMITH,
Petitioner,

v.

GENERAL OF THE ARMY DOUGLAS MacARTHUR, INDIVIDUALLY AND AS GENERAL OF THE ARMY OF THE UNITED STATES IN THE MILITARY OCCUPIED TERRITORY OF JAPAN AND AS SUPREME COMMANDER FOR THE ALLIED POWERS ET AL.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS

BRIEF ON BEHALF OF THE PETITIONER, KOKI HIROTA

DAVID F. SMITH,
Counsel for Petitioner Koki Hirota.

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v.

GENERAL OF THE ARMY DOUGLAS MACARTHUR, INDIVIDUALLY AND AS GENERAL OF THE ARMY OF THE UNITED STATES IN THE MILITARY OCCUPIED TERRITORY OF JAPAN AND AS SUPREME COMMANDER FOR THE ALLIED POWERS; ET AL.

THE MEMORANDUM BRIEF ON BEHALF OF THE PETITIONER, KOKI HIROTA

---

1. The Petitioner, KOKI HIROTA, is a former Prime Minister and three times Foreign Minister of Japan. He retired to private life in May, 1938, and had no connection with the Pacific war or anything done in connection with the Japanese prosecution of that war. This honorable Court has indicated that it desires to hear oral argument upon two points:

(1) Whether the Court has jurisdiction to issue the writ of habeas corpus in view of the United States Constitution, Article III, Section 2, Clause 2; and

(2) Whether the allegations of the petition states a case for relief. The argument will take up first the question of jurisdiction.

2. *Jurisdiction.* At the last Term in *Ahrens et al.* v. *Clark, Attorney General,* 335 U. S. 188, a majority of this Court decided that the District Court of the United States had no jurisdiction to issue a Writ of Habeas Corpus unless the prisoner was within the territorial jurisdiction of the particular court and that the jurisdiction did not attach by reason of the fact that the District Court had jurisdiction over his custodian or jailor. Of course, the same line of reasoning applied to the Judges of the Courts of Appeal of the United States. The Petitioner here is a citizen and national of Japan and has been imprisoned at Tokyo, Japan, continuously since December, 1945, by the 8th Army of the United States in the Military Occupied Territory of Japan. The Petitioner not being within the "territorial" jurisdiction of any of the inferior courts of the United States, he has no remedy for the violation of his rights unless a remedy can be found in this Court, either under the "original" or "appellate," or "inherent" power and jurisdiction of this Court. Had it not been for the decision in *Ahrens* v. *Clark, supra,* the petitioner might have filed a petition for Writ of Habeas Corpus in the District Court of the United States for the District of Columbia on the theory that two of the defendants were within the jurisdiction of that court and, in view of the momentous questions presented here, the Solicitor General of the United States would have accepted Service in the District of Columbia on behalf of General MacArthur and Lt. General Walker. Had that course of action been pursued no question would have arisen about the power of review in this Court under its so-called "appellate" jurisdiction. We are now faced with one of the grave questions precipitated by the decision in the

Ahrens case which was so ably pointed out by the three dissenting justices of this Court in that case. In this legal situation, if this Court should reach the conclusion that it has no jurisdiction under its "original" or "appellate" or "inherent" jurisdiction, we then have a truly anomalous condition fraught with all sort of anxiety and apprehension for the future which would require an amendment to the Constitution of the United States in order to cure a tremendous void in the power of the courts to protect rights under the Constitution, laws, etc. If this Court has no jurisdiction to entertain a petition for a writ of habeas corpus, then all aliens and citizens of the United States physically present on foreign soil in military occupied areas deprived and denied their rights and liberty by official action taken by Army officers of the United States in the violation of the Constitution, laws, treaties, and international engagements to which the United States is a party, have no redress in any judicial forum, state or Federal, in the United States; and in that situation officers of the United States could carry on a reign of tyranny and denial of rights without their actions being subject to review anywhere in the United States. Certainly this is not a result to be lightly contemplated or established.

3. It will be our contention that ever since the days of *Marbury* v. *Madison*, 1 Cranch 137, this Court in a long line of decisions has taken an extraordinarily narrow and erroneous position with respect to its "original" and "appellate" and "inherent" jurisdiction under the Constitution and laws of the United States; and if there is no way out of this legal morass created by that line of decisions, it will be necessary to overrule those cases in order to sustain jurisdiction here to issue a writ of habeas corpus under either the "original" or "appellate" or "inherent" jurisdiction.

4. The provisions of the Constitution and laws of the United States pertinent here are:

Article III, Sec. 2 of the Constitution provides:

> "The judicial power shall extend to all cases, in Law and Equity arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made under their authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party; to Controversies between two or more states;—between a State and Citizens of another state;—between citizens of different States, between citizens of the same States claiming Lands under Grants of different States, and between a State, or the citizens thereof, and foreign states, Citizens or Subjects.
>
> "In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Article I, Section 9, Paragraph 2 of the Constitution provides:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

28 U. S. Code, Section 451, provides:

> "Power of courts. The Supreme Court and the district courts shall have power to issue writs of habeas corpus."

28 U. S. Code, Section 452, provides:

> "Power of judges. The several justices of the Supreme Court and the several judges of the circuit courts

of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. * * *"

28 U. S. Code, Section 453, provides:

"When prisoner is in jail. The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

28 U. S. Code, Section 458, provides:

"Body to be produced. The person making the return shall at the same time bring the body of the party before the judge who granted the writ."

28 U. S. Code, Section 461, provides:

"Summary hearing; disposition of party. The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

5. In Ex parte Hung Hang, 108 U. S. 552, the court said:

"It has long been settled that ordinarily this court cannot issue a writ of habeas corpus except under its appellate jurisdiction. Ex parte Bollman and Swart-

wout, 4 Cranch 75; Ex parte Watkins, 7 Pet. 568; Ex parte Yerger, 8 Wall. 85; Ex parte Lange, 18 Wall. 163; Ex parte Parks, 93 U. S. 18; Ex parte Virginia, 100 U. S. 339; Ex parte Siebold, 100 U. S. 371. Section 751 of the Revised Statutes, which re-enacts a similar provision in the judiciary act of 1789 (Sec. 14), gives this court authority to issue the writ, but except in cases affecting ambassadors, other public ministers or consuls and those in which a state is a party, it can only be done for a review of the judicial decision of some inferior officer or court."

6. We contend that the decision in the *Hung Hang* case and the cases referred to therein as well as the line of reasoning which stemmed from *Marbury* v. *Madison*, all proceeded on an erroneous premise and should be overruled by this court if it cannot otherwise rest jurisdiction here to issue the writ. Counsel regrets very much the insufficient time allowed by the court to brief the historical and momentous questions presented by the instant petition. We contend that the provision of the Constitution dealing with the so-called "original" jurisdiction of this court has consistently, since the early days of this court, received an erroneous interpretation. The exclusive jurisdiction of this court to hear cases involving Ambassadors, Ministers, and Consuls and cases to which a state was a party was grounded by the founding fathers on the simple notion that representatives of Foreign Sovereign Governments, and the States of the Union as litigants, were entitled in the first instance to a dignified and supreme forum, for the adjudicatory process, and unlike ordinary litigants, were not to be relegated, because of their special status, to courts of inferior jurisdiction. As is shown by the early state papers, there was no other notion back of the provision for "original" jurisdiction in this court. We contend that while the congress could not take away or impair this "original" jurisdiction, the Congress at all times

had full power to make exceptions to that "original" jurisdiction, as the Congress did purport to do from the early days of the Republic by the grant of power to the justices of this court to issue writs of habeas corpus under the various habeas corpus acts. It is perfectly plain that this court requires the power granted to the justices under the habeas corpus acts, as part of its "original" or "inherent" jurisdiction in order to effectively discharge its high mission as the final interpreter and guardian of the Constitution and laws of the United States. As the whole judicial power of the United States is vested in this court and such "inferior" courts as the Congress might create from time to time and as the judges of the "inferior" courts in those circumstances have been deprived of the power to issue the writs of habeas corpus, what reason is there to suppose the founding fathers intended this high court to have a power in that respect inferior to the power possessed by "inferior" courts; and this contention is all the more emphasized because it has been universally recognized since time immemorial, that the writ is the great bulwark of freedom and serves a specific purpose not found in any other extraordinary process known to the law. While this court might strike down any Congressional attempt at reduction or elimination of "original" jurisdiction, it has no power to question an act of Congress which enlarged the "original" jurisdiction so long as the great objectives of the Constitution were unimpaired. We submit that *Marbury* v. *Madison*, and the succession of cases following it, dealing with the "original" and "appellate" jurisdiction of this court were wrongly decided and should now be finally overruled if it becomes necessary to do so in order to sustain jurisdiction and preserve the great writ in full vitality.

7. Concurrently with the erroneous line of reasoning with respect to the "original" jurisdiction, the provision

of the Constitution relating to the "appellate" jurisdiction of this court has been misconstrued in a long line of cases. As is shown by the federalist and other contemporary papers, the founding fathers never intended the word "appellate" appearing in the Constitution to be interpreted in a highly strained or technical sense. Rather they intended the words "appellate" to refer generally to a general supervisory or corrective jurisdiction and power over the official actions of all *persons*, as well as inferior tribunals, exercising power in derogation of the constitution, laws, treaties, and international obligations of the United States; and we believe this argument to be correct without regard to whether a "case" or "controversy" had previously originated in an "inferior" court acting in either a military or judicial capacity. However this may be *Marbury* v. *Madison*, and many later cases, with some variations, overlooked the provision of the constitution relating to the "appellate" jurisdiction, which made the "appellate" power subject to such "Exceptions" as the Congress might see fit to enact. We may ask, What kind of Exceptions? That the "Exceptions" were not to be necessarily "appellate" in character is perfectly plain. The "Exceptions" gave the Congress a vast repository of power. The "Exceptions" empowered the Congress to make *additions* to either the "appellate" or "original" jurisdiction of this court and it purported to do so in the Habeas Corpus Acts. If the power to make "Exceptions" were construed to refer to "Exceptions" in the appellate line or course of action, then the words would be largely redundant and meaningless.

The contemporary papers show that the founding fathers purposely drew this loose formula dealing with "Exceptions" to the "appellate" power because it best suited the purposes of a new nation and left to the Congress discretion and room to cure deficiencies arising out of actual

experience in the workings of the judicial system. The Habeas Corpus Acts since the early days of the Republic, as well as the act granting the justices of this court power to issue the writ of Mandamus which was struck down in Marbury v. Madison, have attempted to remedy those deficiencies of power. It is a matter of no moment whether the "Exceptions" relate to the "appellate" jurisdiction or to the "original" jurisdiction. In either case the "Exceptions" made by the Congress supply the power. Nothing in the Constitution gives the faintest impression that the "Exceptions" made by the Congress must conform to the "appellate" channel or course. We contend that the Habeas Corpus Acts, as now consolidated, are a valid exercise of congressional power derived from the provision of the constitution dealing with "Exceptions" and that those "Exceptions" could relate to either "appellate" or "original" jurisdiction, save and except that the Congress could not infringe upon the existing described "original" jurisdiction, relating to Ambassadors, etc. and in cases involving States. Whether the many "Exceptions" made by the Congress since the beginning of the Republic could be put in one category or the other with respect to "original" or "appellate," it is clear that the Habeas Corpus acts did validly grant indispensable power to this court to hear the present petition for a writ of habeas corpus in the peculiar circumstances of this case where the petitioner is not within the "territorial jurisdiction" of any of the inferior courts. The Congress must have had the precise situation in mind which now confronts this court when it granted power to the justices of this court to issue the writ.

8. The great injunction of the Constitution that the writ of Habeas Corpus shall not be suspended except under stated conditions is now in jeopardy because the "inferior" courts under the ruling in the *Ahrens* case, supra, have

no power to act because of territorial considerations. Could the founding fathers ever have contemplated a legal situation in the judicial system of the United States where no federal court had the power to act and preserve that great bulwark of freedom? We submit that the answer is obvious. The Habeas Corpus Acts granted power to this tribunal to act. What reason appears to deny that power when the result of a denial would be to leave great and inalienable rights unprotected in any federal forum? We submit that, aside from the "original" and "appellate" jurisdiction of this court, it has inherent power as the final interpretor and "watch dog" of the Constitution and laws of the United States to issue the writ in order to maintain the supremacy of that Constitution and those laws. Surely the founding fathers never contemplated a situation resulting in a stalemate and inaction because there was no forum for relief. Past decisions of this court with more or less regularity, have persisted in reading its "original" and "appellate" jurisdiction in weazel fashion. Hindsight suggests that line of cases were devoid of real imagination with respect to the intention of the founding fathers in their grant of power to both this court and the Congress and the great purposes of the Constitution. The great injunction that the writ should not be suspended could not be enforced except by judicial action. *Ex parte Yerger*, 8 Wall. (75 U. S.) 85.

9. Our contentions with respect to the power vested in this tribunal under its "original", "appellate" and "inherent" jurisdiction finds support in the federalist (Hamilton, Madison and Jay), where pages 373-376 it is stated:

> "Let us now examine, in what manner the judicial authority is to be distributed between the Supreme and the inferior courts of the union. The supreme court is to be invested with original jurisdiction only

'in cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party.' Public Ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judiciary of the nation. Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nations to which they belong, the same observation is in a great measure applicable to them. In cases in which a state might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal.

"Let us resume the train of our observations. We have seen, that the original jurisdiction of the supreme court would be confined to two classes of cases, and those of a nature rarely to occur. In all other cases of federal cognizance, the original jurisdiction would appertain to the inferior tribunals; and the supreme court would have nothing more than an appellate jurisdiction 'with such *exceptions* and under such *regulations*, as the Congress shall make.' The propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact. Some well intentioned men in this state, deriving their notions from the language and forms which obtain in our courts, have been induced to consider it as an implied supersedure of the trial by jury in favor of the civil mode of trial, which prevails in our courts of admiralty, probates, and chancery. A technical sense has been affixed to the term "appellate", which, in our law parlance, is commonly used in reference to appeals in the course of the civil law. But if I am not misinformed, the same meaning would not be given to it in any part of New England. * * * The word "appellate" therefore, will not be understood in the same sense in New

England as in New York, which shows the impropriety of a technical interpretation derived from the jurisprudence of a particular state. The expression taken in the abstract, denotes nothing more than the power of one tribunal to review the proceedings of another, either as to law or fact, or both. The mode of doing it may depend on ancient custom or legislative provision; in a new government it must depend on the latter. * * *"

"To avoid all inconveniences, it will be safest to declare generally, that the supreme court shall possess appellate jurisdiction, shall be subject to such *exceptions* and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security."

10. The second section of the third article of the Constitution gives this court appellate jurisdiction in all cases in law and equity arising under the Constitution and laws of the United States (except in cases in which it has original jurisdiction) with such exceptions, and under such regulations, as the Congress shall make. The term "appellate" jurisdiction must be taken in its largest sense and to imply in its nature the power to superintend and correct the official acts of citizens of the United States which contravene the Constitution, laws, etc. Habeas Corpus, like the other great and extraordinary writs of quo warranto, prohibition, certiorari are supervisory and corrective in their nature. They are also "appellate" in character and clearly within the "appellate" jurisdiction referred to in the Constitution. See 3 Bl. Com. 402. The Habeas Corpus Acts could be regarded as additions to either the "original" or "appellate" jurisdiction of this court, and having been enacted pursuant to the power in Congress to make "Exceptions" are valid.

It is a settled and invariable principle, that every right, when denied, must have a remedy and every injury its

proper redress. 3 Bl. Com. 109. If the inferior courts of the United States have no power to act in the circumstances of this case, then the remedy must be in this court.

11. The writ of Habeas Corpus is the remedy which the law gives for the enforcement of personal liberty. That judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. *Ex parte Tom Tong*, 108 U. S. 556. It is the usual remedy for unlawful imprisonment *Chin Yow* v. *U. S.*, 208 U. S. 8, and is a collateral attack of a civil nature to impeach the validity of a judgment and sentence of another court, either civil or military. *In re Frederich*, 149 U. S. 70.

12. Habeas Corpus proceedings have been entertained when both the custodian and his prisoner are outside the territorial jurisdiction of the court. *Ex parte Yee Hick Ho*, 33 F. (2d) 360; *U. S.* v. *Day*, 50 F. (2d) 816; *James* v. *Biddle*, 131 F. (2d) 853; *U. S.* v. *Schlotfeldt*, 136 F. (2d) 935.

13. We also contend that during the existence of a state of war between the United States and Japan the Constitution of the United States follows the flag into the military occupied territory of Japan, and that the process and writ of this court can reach unlawful action by officers of the United States Army in contravention of the Constitution and laws, etc. of the United States.

14. It would be truly catastrophic for this court to announce that nowhere in the Federal system can the writ of Habeas Corpus issue when the prisoner is not within the territorial jurisdiction of the United States. If, in order to avoid passing upon the large questions raised here, this court is minded to overrule *Ahren* v. *Clark*, *supra*, then petitioner requests a reasonable opportunity to file a petition for the writ in the District Court of the United States for the

District of Columbia. As that court would probably refuse a decision on the momentous questions presented by the petition here, the case could be brought quickly to this court and in that situation this Court would, under the decisions as they stand now have undoubted "appellate" jurisdiction.

15: *Whether the petition states a case for relief.* At the outset it should be pointed out that the petitioner is not asking this court to review the decision of an international court, although an American judge sat on the International Military Tribunal for the Far East and purported to exercise authority on behalf of the United States. Indeed, it is hard to describe the International Military Tribunal for the Far East as an "international" tribunal. It might more properly be described as a tribunal of the allied powers in the war against Japan notwithstanding the fact that a number of nations who declared war upon Japan, such as Brazil, Peru, Colombia, and Mexico were never invited to send a judge to participate in the deliberations of that tribunal. All the questions petitioner raises here with respect to violation of rights under the Constitution, laws, treaties and international engagements of the United States, such as the Japanese Instrument of Surrender signed on September 2, 1945, deal solely with official actions taken by General MacArthur as citizen and army officer of the United States. General MacArthur created the International Military Tribunal for the Far East by the issuance of the special proclamation and charter fully described in the petition. He gave the tribunal no final authority to carry out its judgment and sentence. The charter rendered the tribunal purely a fact finding advisory organ to General MacArthur acting in his capacity as Supreme Commander for the Allied Powers. The charter provided with respect to the judgment of said tribunal that it would be "transmitted directly to the Supreme Commander for the Allied Powers for his

action," and that sentence will be carried out in accordance with the order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence, except to increase its severity." In other words the judgment of the tribunal had no finality; it was not self-executing; and it could not have any validity or effect until such time as it was approved by General MacArthur. We repeat again that we bring into question in the instant petition only unlawful action taken by General MacArthur as a citizen of the United States and the Commanding General of the Armed Forces of the United States in the Pacific Theatre. In the charter for the establishment of the tribunal General MacArthur defined certain alleged crimes without authority of law which were called "crimes against peace," "crimes against humanity," and conspiracy to commit crimes against peace and humanity. In that charter he also permitted the tribunal to consider "conventional war crimes" which had always been theretofore triable in national military courts or commissions. The petition raises grave questions with respect to unlawful action taken by General MacArthur in violation of a number of provisions of the Constitution of the United States. The petition also raises questions with respect to the interpretation of the Japanese Instrument of Surrender to which the United States was a party. The latter point deals with the contention that petitioner was convicted solely for actions and omissions which occurred prior to May, 1938, and had no connection with the Pacific War proper which began on December 7, 1941. The Japanese Instrument of Surrender related solely to a surrender with respect to the Pacific war proper and was so understood and intended by the Japanese Government and all of the Allied Powers at the time of the surrender. This involves the proper construction of an international compact or international engagement of the

United States, and in our opinion is entitled to construction in the same manner as is a treaty of the United States. As the petitioner was convicted solely for acts and omissions occurring while he occupied the high office of Prime Minister and Foreign Minister, questions are raised under the law of Nations whether the head or quasi-head of a foreign government domiciled on foreign soil is triable for alleged war crimes as an individual and whether he is entitled to the "exemption" from detention by an officer of the United States under 28 U. S. C., sec. 453, which provides for review in the United States when this prisoner "is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations."

16. Serious questions are raised with respect to the procedure and practice directed to be followed by the tribunal in the charter. Our position is that the procedure and practice having been authorized by General MacArthur and subsequently affirmed by him, the acts of the tribunal in the course of the trial were adopted by General MacArthur as his acts.

17. Additional grounds in support of jurisdiction here appear in paragraph 19 of the petition. These are repeated in summary form for the more ready understanding of the court:

Petitioner alleges that General of the Army Douglas MacArthur, as a citizen of the United States, acting either in his capacity as a General of the Army of the United States or as Supreme Commander for the Allied Powers, had no authority at any time from the Congress or the President of the United States to create the International Military Tribunal for the Far East or to issue a special

charter for the government and procedure of said Tribunal; and his action in that respect has never been ratified; that nothing contained in the Potsdam Declaration or the Japanese instrument of surrender of September 2, 1945, or anything done by way of "implementation" of the Japanese instrument of surrender, furnished any lawful basis for the creation of an International Military Tribunal for the trial of "crimes against peace," "crimes against humanity," and "conspiracy to commit crimes against peace and against humanity"; or for the trial of "conventional war crimes in violation of the customs and usage of war" in any court other than a national court or commission.

General of the Army Douglas MacArthur has not heretofore been authorized by any law enacted by the Congress of the United States of America or any provision of its Constitution to establish a Military Tribunal for the trial of war criminals other than an American Military Tribunal or commission; nor has the Congress of the United States of America authorized him to appoint American or Philippine civilian or military judges to an International Military Court or to associate or pool or commingle American interests and powers in such a Tribunal; nor has the Congress of the United States ever authorized or empowered him to accept an appointment or office or place of trust from sovereign foreign nations for the purpose of establishing an International Military Tribunal or to appoint either civilian or military judges of those foreign nations to such Tribunal; that the powers resting in General of the Army Douglas MacArthur, as Supreme Commander for the Allied Powers, are confined to the Military Occupation of Japan, the coordination of such operations, maintenance of the security of the occupation, including the power to appoint only an American Military Tribunal or commission for the trial of conventional war crimes, as the same have been heretofore defined in the customs and

usages of war and in the Articles of War enacted by the Congress of the United States.

The action of General of the Army Douglas MacArthur, in accepting an office, title and place of trust from ten (10) foreign governments without consent of the Congress of the United States of America for this purpose, and undertaking to appoint civil and military judges to sit in an International Military Tribunal to represent such foreign governments and the United States, and his reservation of sole right to review, approve, reverse or modify the final decision of such Tribunal on behalf of eleven governments, which decision of the Tribunal was purely advisory, was and is in violation of Article 1, Section 9, Clause 8 of the Constitution of the United States of America which reads in part: "And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept any present, Emolument, Office or Title, of any kind whatever, from any King, Prince or foreign State," and of Article 1, Section 8, Clause 14 of the Constitution of the United States of America which provides that the Congress has the sole power "to make Rules for the Government and Regulation of the land and naval forces." The amended charter of April 26, 1946, is repugnant to and in violation of Arficle 1, Section 9, Clause 3, of the Constitution of the United States of America which provides that "No Bill of Attainder or ex post facto law shall be passed;" that the body of law specially stated in the charter for the International Military Tribunal for the Far East defined a novel and nonexistent body of the law of nations as it relates to "crimes against peace," "crimes against humanity," and conspiracy to commit such alleged crimes and, being ex post facto, were, by the same token, rendered acts of attainder against the Petitioner; and in that the provision for the trial of "conventional war crimes" at the international

level, rather than in national courts as practiced since time immemorial, changed the rules, standards and forum after the commission of acts and omission for which the Petitioner was convicted and constituted ex post facto action; that the issuance of such special charter was repugnant to and in violation of Article 1, Section 8, Clause 10 of the Constitution of the United States of America which provides that the Congress shall have sole power "to define and punish * * * offenses against the laws of nations," in that the Congress of the United States has never at any time defined any such body of law; nor has the "law" stated in the charter been otherwise recognized by the legislative, executive or judicial authority of th United States of America to be either national law or the law of nations; that the statement of such alleged body of law set forth in the special charter is repugnant to and in violation of the Fifth Amendment to the Constitution of the United States of America which provides in part; "No person * * * shall * * * be deprived of life, liberty, or property, without due process of law; * * *," in that the statement of such a novel body of law, having no previous existence or recognition at either the national or international level by the United States or in other civilized nations, deprived this Petitioner in circumstances of this case of life and liberty without due process of law under authority and color of an act performed by a citizen and a military officer of the United States; that the action of General of the Army Douglas MacArthur, in stating such novel body of law in the special charter, constituted the exercise of legislative power not derived from the Constitution or laws of the United States of America or the laws of any foreign country represented on such Tribunal; and further neither the Potsdam Declaration nor the Japanese instrument of surrender created or established any new law, nor did said instruments authorize the crea-

tion or the establishment of any new law, national or international, for the trial of war criminals or the procedure to which Petitioner was subjected.

General of the Army Douglas MacArthur, in making and promulgating the amended charter of April 26, 1946 for the establishment, government and procedure of the Tribunal, so limited and circumscribed the functions and powers of the Tribunal and so altered, revised and abrogated the basic, essential and fundamental rules of evidence, procedure and trial as heretofore applied by National Military Tribunals and commissions and courts of criminal justice in all civilized nations, including the United States of America, that said amended charter itself deprived the Tribunal of all opportunity and power to accord this Petitioner a fair and impartial trial in accordance with basic, accepted and minimal standards of justice of all civilized nations; and this action is repugnant to and in violation of the 5th and 6th Amendments of the Constitution of the United States of America which provide in part, "No person * * * shall be deprived of life, liberty, or property, without due process of law; * * *," and "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses in his favor, and to have the assistance of counsel for his defense." Said Tribunal in pursuance of the unprecedented procedure set forth in the charter received in evidence against this Petitioner, over objection and the exception of this Petitioner, hundreds of documents consisting of *ex parte* affidavits, unsigned and unsworn statements, diary entries, newspaper reports, unofficial documents, hearsay statements of the second and third degree secondary evidence of the contents of the documents, unidentified reports, long prosecution summaries of its version of the contents of innumerable affidavits, reports, etc. which were not themselves introduced in evidence and which summary was ac-

cepted by the Tribunal as an exhibit in the trial; and the Tribunal thus deprived the Petitioner of the ordinary right of cross-examination and elementary justice; in pursuance of said special charter the Tribunal refused to call as witnesses at the request of the Petitioner the persons whose *ex parte* affidavits were admitted into evidence over his objection and exception; and the Tribunal on innumerable occasions refused to call witnesses at the request of the Petitioner who were reasonably expected to give testimony relevant and material to the defense of this Petitioner; and in pursuance of the special and relaxed provisions of said charter the Tribunal required the Defendants to submit a higher standard of proof than was required of the Prosecution throughout the 8 months it took for presentation of its case; and otherwise the proceedings and rulings of said Tribunal on hundreds of occasions, mostly by majority vote, throughout the trial were contrary to the practice and procedure of national military courts and criminal courts, and by reason thereof the findings and judgment of said Tribunal were vitiated.

The basic actions of said Tribunal prejudicial to this Petitioner were further emphasized and facilitated by provisions of the special charter as follows:

Article 4(c) which provided that a judge of the Tribunal may function in absentia and as several of the judges absented themselves for considerable periods of time during the course of the trial, this Petitioner was deprived of the right to have such judges see and hear the witnesses for and against him and an opportunity to appraise their credibility; Article 5(a) to (e), all inclusive, purported to define without authority of law, *ex post facto*, what constitutes alleged war crimes and violation of the laws and customs of war, thus depriving the Tribunal of all opportunity to judge and ascertain in its own right the status, meaning and condition of the laws of war as applied by the

various nations of the world and by the nations represented on the Tribunal; Article 6 which permitted the Tribunal, as it did in fact, to strip this Petitioner of the right to defend on the ground that he acted or omitted to act by virtue of an order of the Japanese Government or of a superior; Article 13(a) which provided without authority of law that the technical rules of evidence (as heretofore applied by military tribunals, commissions and criminal courts) shall not be binding on the Tribunal and that the Tribunal may apply an unknown standard and rule of evidence of its own making, limited only by the views of the majority of the Tribunal as to what constituted "probative value"; Article 13(c)(1) to (5), all inclusive, which provided generally for the admission of evidence against this Petitioner by the Tribunal on innumerable occasions of hearsay and *ex parte* statements, reports, affidavits and depositions, thereby depriving the Petitioner of the ordinary right established since time immemorial to be confronted in military and criminal trials by the witnesses against him and to be afforded an opportunity to cross-examine any witness against him; and Article 13(a) which provides that the Tribunal may take judicial notice of various described matters, which it did on innumerable occasions, dealing with subjects never heretofore considered by any military or judicial Tribunal as falling within the doctrine of judicial notice.

The trial conducted by such Tribunal, pursuant to the special charter, was prejudicial to your Petitioner in that the Tribunal in applying the charter rule of "probative value" summarily rejected by majority vote hundreds upon hundreds of material and relevant documents indispensable to the defense of this Petitioner upon the charges contained in the indictment and upon which he was convicted.

18. The foregoing points show that the entire action taken by General MacArthur against the Petitioner was

without any authority from the Congress or the President of the United States. That ground alone would invoke jurisdiction here. But, as previously shown it is also claimed that the petitioner was unlawfully deprived of his liberty in violation of many sections of the Constitution. We, therefore, respectfully ask this honorable court to allow the petition for the Writ of Habeas Corpus to be filed and prosecuted.

All of which is most respectfully submitted.

DAVID F. SMITH,
Attorney for Petitioner,
KOKI HIROTA.

(9883)

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Nos. 239, 240, and 248, Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1948

KOKI HIROTA, PETITIONER

v.

GENERAL OF THE ARMY DOUGLAS MACARTHUR, ET AL.

KENJI DOIHARA, PETITIONER

v.

GENERAL OF THE ARMY DOUGLAS MACARTHUR, ET AL.

KOICHI KIDO, TAKAZUMI OKA, KENRYO SATO, SHIGETARO SHIMADA AND SHIGENORI TOGO, PETITIONERS

v.

GENERAL OF THE ARMY DOUGLAS MACARTHUR, ET AL.

ON MOTIONS FOR LEAVE TO FILE PETITIONS FOR WRITS OF HABEAS CORPUS

BRIEF IN OPPOSITION TO MOTIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1948

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239 Misc.

KOKI HIROTA, PETITIONER

v.

GENERAL OF THE ARMY DOUGLAS MACARTHUR, ET AL.

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240 Misc.

KENJI DOHIHARA, PETITIONER

v.

GENERAL OF THE ARMY DOUGLAS MACARTHUR, ET AL.

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248 Misc.

KOICHI KIDO, TAKASUMI OKA, KENRYO SATO, SHIGETARO SHIMADA AND SHIGENORI TOGO, PETITIONERS

v.

GENERAL OF THE ARMY DOUGLAS MACARTHUR, ET AL.

ON MOTIONS FOR LEAVE TO FILE PETITIONS FOR WRITS OF HABEAS CORPUS

BRIEF IN OPPOSITION TO MOTIONS

STATEMENT

There have been filed with this Court ~~three~~ four motions for leave to file petitions for writs of

habeas corpus on behalf of ~~seven~~ eleven enemy aliens. The petitioners are being held in custody pursuant to the judgment of the International Military Tribunal for the Far East. All of the petitioners are citizens of Japan, and all were high officials of the Japanese government or high officers of the Japanese armed forces during or preceding the recent hostilities between Japan and the allied powers.

The official capacities of the respondents (who are also sued individually) are as follows: General of the Army Douglas MacArthur is United States Commander in Chief, Far East Command, and is Supreme Commander for the Allied Powers, with headquarters in Tokyo, Japan; Lieutenant General Walton H. Walker is Commanding General of the United States Eighth Army in Japan, which is a part of the Allied occupation army, with headquarters in Tokyo, Japan; General Omar H. Bradley is Chief of Staff of the United States Army;[1] Kenneth C. Royall is Secretary of the Department of the Army; James V. Forrestal is Secretary of Defense.

At various times after the Japanese surrender on September 2, 1945, the petitioners were taken

NOTE.—This brief is accompanied by a Documentary Appendix, separately bound, containing most of the official documents referred to in the following discussion.

[1] General Bradley is named as respondent in two of the four petitions accompanying the motions; he is not named as respondent in the other two.

into custody by the Allied forces. On November 12, 1948, and after an extended trial, the petitioners were found guilty by the International Military Tribunal for the Far East of various war crimes. The charges upon which the petitioners were convicted were of three general types: (1) crimes against peace, (2) conventional war crimes, and (3) crimes against humanity, including murder. Petitioners Hirota, Dohihara, Kimura and Muto were sentenced to death; petitioners Kido, Oka, Sato, Shimada, and Umezu were sentenced to life imprisonment; petitioner Togo was sentenced to 20 years' imprisonment, and petitioner Shigemitsu to seven years' imprisonment.[2]

Each of the petitioners is presently confined in Sugamo Prison, in Tokyo, Japan. The petitioners are in the custody of respondent Lieutenant General Walton H. Walker, Commanding General of the United States Eighth Army, who holds the petitioners pursuant to the orders of General

[2] The former official positions of the petitioners may be summarized briefly as follows: Hirota, Foreign Minister and Prime Minister of Japan; Shigemitsu, Foreign Minister; Kido, cabinet member and Lord Keeper of the Privy Seal; Togo, Foreign Minister; Dohihara, Sato, Kimura, Muto, and Umezu, high officers in the Japanese Army; Shimada, Navy Minister; Oka, a high officer in the Japanese Navy. The various positions held by the petitioners are set forth in detail in Appendix E of the indictment on which petitioners were tried before the International Military Tribunal for the Far East.

Douglas MacArthur as Supreme Commander for the Allied Powers. General Walker has been directed by the Supreme Commander to carry out the sentences imposed upon petitioners by the Tribunal, and is ready to do so.

Although the petitioners do not all make the same contentions, their principal challenges to the convictions based on American law are: (1) that since the United States Constitution, Art. I, Sec. 8, empowers Congress to define and punish offenses against the law of nations, the executive branch of the Government is without power to enter into an agreement with other nations defining such offenses and authorizing the establishment of the International Military Tribunal for the Far East for the trial and punishment of such offenses; (2) that the executive branch of the Government is without power to enter into an international agreement to punish petitioners for offenses which, if defined by Congress, would violate the *ex post facto* clause of the Constitution, Art. I, Sec. 9; (3) that General MacArthur is prohibited from acting as Supreme Commander of the Allied Powers in establishing the Tribunal pursuant to the international agreement and in executing its judgments, by the provision of the Constitution, Art. I, Sec. 9, that no officer of the United States "shall, without the consent of the Congress, accept of any * * * office, or title, of any kind whatever, from any * * * foreign state."

The petitioners also raise certain issues based upon international law.

It is the government's position that this Court has no jurisdiction to issue a writ of habeas corpus or to review the judgments of the International Military Tribunal for the Far East, and hence that neither the issues based upon American law nor those based upon international law should be considered. We deal in this brief only with the contentions made by petitioners under American law since their contentions under international law would manifestly be relevant only if this Court should determine that it has jurisdiction to review the proceedings of an international tribunal.

On December 6, 1948, this Court announced that "it desires to hear argument upon the questions presented by the motions for leave to file petitions for writs of habeas corpus." *

SUMMARY OF ARGUMENT

I

A. Since this cause is not one within the original jurisdiction of this Court as defined in Article III, Sec. 2, Cl. 2, of the Constitution, this Court has power to issue an original writ of habeas

* The order refers to the motions and accompanying petitions in Nos. 239, 240, and 248, Misc. The fourth petition was filed in No. 267, Misc., after the order of December 6th, and the Court has not yet acted upon the motion in that case.

corpus only in aid of its appellate jurisdiction. *Ex parte Siebold*, 100 U. S. 371, 374–375.

B. The appellate jurisdiction which this Court may exercise must relate to an exercise of the judicial power under Article III, Sec. 2, cl. 1, of the Constitution. *Ex parte Hung Hang*, 108 U. S. 552. Since even American military commissions do not represent an exercise of judicial power under Article III of the Constitution (*Ex parte Vallandigham*, 1 Wall. 243), *a fortiori*, an international tribunal, exercising the military power, not of the United States alone, but of nations who together waged war, does not exercise judicial power under the American Constitution. This Court, therefore, has no appellate supervisory jurisdiction over such a tribunal.

C. Assuming that this Court could exercise appellate jurisdiction, if the action could properly have been brought in some district court of the United States, no such appellate jurisdiction exists since no district court of the United States has jurisdiction to entertain an application by these petitioners. The only power which the courts of the United States have to review judgments of military commissions is the power to grant writs of habeas corpus to inquire into the cause of restraint of liberty. *In re Yamashita*, 327 U. S. 1, 8. No district court of the United States would have jurisdiction to issue a writ of habeas corpus on the relation of these peti-

tioners since petitioners are not detained within the territorial jurisdiction of any district court, and there is not within the reach of the process of a United States Court any respondent having effective custody and control of the petitioners.

1. In *Ahrens* v. *Clark*, 335 U. S. 188, holding that ordinarily a federal district court is without jurisdiction to issue a writ of habeas corpus when the person on whose behalf the writ is sought is not detained within the territorial jurisdiction of the court; this Court left open the question of what process a person confined in an area not subject to the jurisdiction of a district court may invoke to assert federal rights. However, the reasoning by which this Court reached its conclusion in the *Ahrens* case indicates that there is a total absence of power to issue the writ where there is no detention within the district. That conclusion is reinforced by the revision of the habeas corpus statute in Title 28 of the United States Code and by the common law of habeas corpus.

2. Whether or not the power of the district court to issue a writ of habeas corpus depends on the place of detention, it is clear that, if the relator is detained outside the jurisdiction, there must at least be within the jurisdiction of the court a person who has such control and custody of the person detained that he has power to order the release of the person held. There is no such

person within the jurisdiction of any district court of the United States.

The chain of authority under which petitioners are held runs as follows: The Far Eastern Commission, comprised of eleven nations, makes policy decisions with respect to the occupation and control of Japan, and has made a policy decision on war crimes. Its decisions are transmitted by the United States Government through the channels of the American Joint Chiefs of Staff to the Supreme Commander for the Allied Powers who carries out those commands as Executive Authority for the Allied Powers. In that chain of authority, the only persons presently within the reach of the process of any district court of the United States are the Joint Chiefs of Staff. They, however, merely act as a conduit to transmit the policies of the Far Eastern Commission to the executive officer. The United States has no power to deviate from the policy decisions of the Commission. An order by the Joint Chiefs of Staff contrary to a policy decision would, therefore, not be binding on the Commission or the Supreme Commander as the executive authority for the Allied Powers. Hence, neither the persons having immediate custody nor the persons having ultimate and effective control of petitioners are within the jurisdiction of a court of the United States.

II

Petitioners are not governed by and have no standing to assert rights under the Constitution and laws of the United States. They are citizens and residents in Japan, a country which forms no part of the United States or its possessions. That country has been conquered, not by the United States alone, but by a group of allied nations. That country surrendered, not to the United States alone, but to the four major allied powers, and it is presently governed, not by the United States alone, but by allied powers. Petitioners are thus foreigners in a foreign land, held in that foreign land by the sovereignty presently governing that foreign land. The Constitution and laws of the United States, therefore, cannot apply to them.

Whether the persons acting for the United States as part of the allied powers who together make up the government of Japan are properly so acting under the United States Constitution, is not a matter which concerns petitioners. Before they can challenge the right of anyone to act under the Constitution or laws of the United States, they must show that they have rights under the Constitution and laws of the United States. Since the petitioners can make no such showing, they have no standing to come into a United

States Court under any statute of the United States.

III

A. Since petitioners are held pursuant to the judgment of an international tribunal by the executive authority for the allied powers, the judgment under which they are being held, and the action of that executive officer are not subject to review by this Court or by any national court.

1. The international character of the International Military Tribunal for the Far East is certified to by a letter from the Acting Secretary of State. We submit that this certification must be accepted by this Court as a conclusive determination of the character of the tribunal whose judgment petitioners attack.

This Court has always insisted that American courts should so act as not to embarrass the executive arm in its conduct of foreign affairs. *Republic of Mexico* v. *Hoffman*, 324 U. S. 30. It has accepted without question presidential recognition of a foreign government (*United States* v. *Belmont*, 301 U. S. 324, 330), executive decision as to which nation is sovereign over a particular place (*Jones* v. *United States*, 137 U. S. 202, 212), a certification by the State Department that a foreign vessel is state-owned and immune from seizure (*Ex parte Peru*, 318 U. S. 578, 590). Far more significant is the executive department's present certification that the tribunal whose judg-

ment is here questioned is a truly international court. The present occupation of Japan involves many complex strands in our present relations with the world community, and serious harm may follow a holding that the military tribunal is not the international enterprise participating countries have taken it to be.

2. If this Court chooses to examine the nature and status of the international military tribunal, its conclusion must necessarily accord with that of the State Department. The trial by which petitioners were convicted was a wholly international undertaking.

a. In the Potsdam Declaration of July 26, 1945, subsequently adhered to by the Soviet Union, the United States, Great Britain and China proclaimed the terms of surrender for Japan and announced that points in Japanese territory would be occupied by the allied powers. (Documentary Appendix, pp. 1-3.) Japan surrendered to the governments of the United States, United Kingdom, U. S. S. R. and China. The Instrument of Surrender was signed by the Supreme Commander for the Allied Powers on behalf of those four nations, and was also signed by representatives of the nine powers at war with Japan. (Documentary Appendix, pp. 11–12.)

The position of the Supreme Commander with relation to the allied powers was clarified by the Moscow agreement of December 1945, acceded to

by the foreign ministers of the United Kingdom, U. S. S. R., and the United States, with the concurrence of China in the Far Eastern provisions. By this agreement the Supreme Commander became the "sole executive authority for the Allied Powers in Japan." (Documentary Appendix, pp. 14–20.)

There was also established a Far Eastern Commission composed of representatives of the nine nations signatory to the instrument of surrender, plus India and the Philippine Commonwealth. The Commission's functions were described in its Terms of Reference to be (1) formulation of policies by which Japan could fulfill its obligations under the terms of surrender; (2) the review of any directive issued to or any action taken by the Supreme Commander involving policy decisions within the jurisdiction of the Commission; (3) consideration of such matters as might be assigned to it by agreement among the participating governments. The Commission's policy decisions are transmitted to the United States Government, and that Government prepares directives in accordance with these decisions and transmits them to the Supreme Commander. The United States may issue interim directives pending action by the Commission, provided that any directives dealing with fundamental changes in the regime of control will be issued only following consultation and agreement in the Far Eastern Commission. (Documentary Appendix, pp. 15–17.)

The Supreme Commander for the Allied Powers thus acts for the allied powers in concert. The allied character of the occupation has been constantly recognized and reaffirmed by the United States Government, the Allied Powers, and the Far Eastern Commission. Supreme dominion over Japan is held, not by the United States or by any single nation, but internationally and jointly by a group of powers.

b. The apprehension, trial and punishment of war criminals has been a major war aim and is part of the basic post-surrender policy of all the nations participating in a war against the axis. For Japan the war crimes policy was first suggested in the Cairo declaration of December 1, 1943, issued by the Presidents of the United States, China and the Prime Minister of the United Kingdom. This policy was formally stated in the Potsdam declaration announcing as one of the terms of surrender "that stern justice shall be meted out to war criminals."

In October 1945, before the Far Eastern Commission was established by the Moscow agreement, the United States Government approved a directive embodying the policy of the United States in regard to the apprehension and punishment of war criminals in the Far East. This policy expressly envisaged the creation by the Supreme Commander, with the participation of other nations, of special international military

courts to be appointed under international authority. This directive was transmitted to the other allied powers with the suggestion that they participate in the proposed international tribunal. After consultation with the nine nations which signed the instruments of surrender, the Supreme Commander on January 19, 1946, proclaimed the establishment of the International Military Tribunal for the Far East. This was after the Moscow agreement establishing the Far Eastern Commission, but before the Commission actively functioned as such.

After the Commission began to function, it adopted a policy decision on war criminals, dated April 3, 1946. This policy decision defined the nature of war crimes substantially in accordance with the Nuremberg charter. It provided that the Supreme Commander shall have power to appoint special international military courts for the trial of the Far Eastern war criminals and, subject to consultation, power to prescribe rules of procedure for such courts. The policy decision expressly stated that "in the appointment of the international courts and in all trials before them the international character of the courts and the authority by which they were appointed and under which they act should be properly emphasized and recognized, particularly in dealings with the Japanese people." The decision further gave the Supreme Commander for the Allied

Powers responsibility for carrying out the judgments of any international courts and the power to modify sentences after consultation with representatives of the interested nations.

A directive based on the Commission's war crimes policy decision was transmitted to the Supreme Commander through the Joint Chiefs of Staff. On April 26, 1946, the Supreme Commander superseded the original charter and promulgated the charter under which petitioners were tried. The tribunal consisted of 11 members, representing each of the countries making up the Far Eastern Commission. Petitioners were tried under an indictment brought in the name of the 11 powers, signed by the Chief of Counsel acting on behalf of the United States and by associate counsel each acting on behalf of one of the other participating nations. The tribunal's judgment was delivered in November 1948, and was transmitted directly to the Supreme Commander as the charter required. After consultation with the other interested nations, in accordance with the Far Eastern Commission's war crimes policy decision, the Supreme Commander approved the sentences and ordered that they be carried out.

These facts conclusively establish that the International Military Tribunal for the Far East is a truly international tribunal.

B. Since petitioners are held under the judgment of an international tribunal, no national court can review the judgment or any action taken to carry out the judgment. The international tribunal was not established under American law or pursuant to American authority, but draws its life wholly from international agreements and cooperative undertakings. Its source of power and authority is independent of the domestic law of the 11 participating states, and the sovereign which created it is separate and distinct from any of these nations. Under traditional principles our courts will not undertake to pass upon the validity under the municipal law of another state of the acts of the officials of that state purporting to act as such. Still less should our courts undertake to pass upon the validity of the proceedings before an international court trying enemy aliens in enemy territories under international control.

Moreover, our courts have no power under the Constitution to decide political questions directly involving the foreign relations of the United States. A controversy over the jurisdiction and proceedings of an international court for the trial of enemy war criminals manifestly presents such political questions.

Once it is suggested that the American courts may undertake to review the judgments of an international court or pass upon the action of the

agents of an international authority, most unhappy consequences can be anticipated in the development of international affairs. Other nations cannot be expected to agree to the establishment of international courts if our domestic courts are free to review their holdings on habeas corpus or otherwise. If American courts have this freedom, there is nothing to gainsay similar competence in the courts of other nations. Peaceful and judicial settlement of international disputes as well as continued growth of world law is bound to be hampered. Other cooperative endeavors in which Americans are employed as agents of international bodies, such as United Nations activities will also suffer. We do not hesitate to declare the Government's deep concern at any such threat to our power to engage in international activities.

IV

Petitioners challenge the President's power to enter into an international agreement by which the international military tribunal was established on the ground that (1) the President possesses no power to enter into an agreement to define and punish offenses under the law of nations because Article I, section 8, of the Constitution fixes that power exclusively in Congress, (2) the definition of crimes against the peace in the charter of the International Military Tri-

bunal violates the command of Article I, section 9, of the Constitution that no *ex post facto* law shall be passed. It is the Government's position that the President's action was well within his powers as Commander-in-Chief and as the organ of this Government in the conduct of its foreign relations.

Under the Constitution the power of the President as Commander-in-Chief includes the power to exercise military government over conquered enemy country. In such government, the President represents the whole sovereignty of the Nation. Specifically, it has been repeatedly held that the President and the military commanders may establish courts not provided for by the Articles of War and confer upon those courts civil and criminal jurisdiction. *Leitensdorfer* v. *Webb*, 20 How. 176, 178. Still more specifically, "An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." *Ex parte Quirin*, 317 U. S. 1, 28; *In re Yamashita*, 327 U. S. 1, 11.

Under our Constitution the President, as Commander-in-Chief, is solely responsible for the taking of all steps necessary to maintain and protect our military occupation. These are great

powers but they are inherent in the responsibilities which the Constitution imposes on the President as Commander-in-Chief. It is neither trite nor meaningless to say that the President's responsibility for his exercise of these great powers is entirely political. Determinations must be made in the light of facts which are within the peculiar knowledge of the President and the military commanders: the temper of the people, the past roles of enemy leaders, the disposition of American forces and our relationships to other nations.

Moreover, in an allied war, waged not by the United States alone, but by the United States in conjunction with other powers, the President must also exercise the great power which he has as the organ of the United States in the conduct of foreign relations. Even in times of peace, the President has power to enter into agreements with other nations in matters concerning the defense of the United States. In wartime, and particularly in the waging of coalition war as in World War II, the occasion and necessity for such agreements between military allies is self-evident.

In view of the circumstances under which Japan was conquered and occupied by the joint allied powers and in view of the great authority which is entrusted to the President under our Constitution both as Commander-in-Chief and as the organ of the United States in foreign rela-

tions, we think it is clear that the President had power to enter into an agreement with our Allies unlimited by the restrictions of American domestic law. In its dealings in the international field, the right and power of the United States "are equal to the right and power of the other nations of the international family. Otherwise, the United States is not completely sovereign." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318.

Whatever might be the limit of the President's power, if Congress had ever purported exhaustively to define offenses against the law of nations, the fact remains that Congress has never done so. The purpose of Article I, Sec. 9 of the Constitution was to vest in the Federal Government, to the exclusion of the states, the power to define offenses against the law of nations as an element of the exclusive control of foreign relations to be vested in the Federal Government. Madison, in the *Federalist*, No. 42. Congress has left the definition of the offenses which might be tried by American military commissions "to the rules and precepts of the laws of nations," and this Court has recognized that such offenses may be defined in treaties. *In re Yamashita*, 327 U. S. 1, 7–8. A formal treaty, however, is not the only method by which this Government may join with other nations in defining and prescribing punishments for offenses against the laws of

nations arising out of a war. The President, both as Commander-in-Chief and as the organ of the Federal government in foreign relations, must have power to represent the United States in reaching an agreement with our military allies as to what must be done to carry out the policy of this nation and the policies of other participating nations to punish war criminals. Since the punishment of war criminals is part of the conflict, the power to wage war collectively must include the power to try war criminals collectively.

These same considerations compel the conclusion that the President, in entering into agreements with other governments for the punishment of war crimes, is not restricted by such limitations of our domestic law as the provision in Article I, Section 9, of the Constitution that no *ex post facto* law shall be passed. An international agreement inherently involves a compromise of the legal policies of the participating nations. To conclude that domestic legal policies of the United States must govern the content of any such agreement to which the United States is a party would create intolerable uncertainty as to whether our concurrence was effective. If each of the other nations should take the same position, that there are domestic limitations applying to international agreements, it would probably be impossible for nations to act jointly in the development of international order. The

agreement for the definition and punishment of war crimes is a political and military decision to which the *ex post facto* clause of the Constitution has no more application than it does to the retrospective operation of judicial decisions.

Actually, the question presented is not whether the general principle against retroactive criminal legislation should be applicable to the definition and punishment of war crimes. Petitioners' real contention is that this nation may not participate in an international agreement defining and punishing war crimes except upon the condition that our rule against *ex post facto* criminal legislation be applied in exactly the same way as our courts would apply it to acts of Congress under the same circumstances. Fundamental justice does not require all the gloss that has been attached to the interpretation of the *ex post facto* provision of our Constitution. If the United States is to participate with other nations in the development of international law generally, it must be on the basis of compromise, and on the assumption that the representatives of other legal systems are as zealous as ours in seeking to administer fundamental justice.

V

Whatever the powers of the United States to enter into an international tribunal, the fact remains that the tribunal has acted, and that Gen-

eral MacArthur, as Supreme Commander for the Allied Powers, now proposes to carry out its sentences. No American court has jurisdiction to question the validity of the policy decision of the Far Eastern Commission after subtracting therefrom the participation of the United States or to determine the effect of alleged illegal American participation.

Petitioners attack the authority of General MacArthur to act for the nations other than the United States on the ground that by so doing he would accept a title and place of trust from foreign governments, without consent of Congress, in violation of Article I, Section 9, of the Constitution. In effect, they are arguing that that clause prohibits an American officer from exercising the supreme command of the armed forces of nations joined with us in war against a common enemy.

The contention is made too late in American history. The Nation was born of a military coalition of the original colonies. It is incredible that the men who recognized the necessity of unified command at the outset of the Revolution intended by this clause to prevent any American from exercising unified command over the troops of the United States and other nations allied with it. If the United States has power to wage war, it must have the power to join with allies in successfully prosecuting that war. Where war requires

a unified command, an American officer may exercise command over the troops of other nations, and in so doing, he must faithfully execute the allied decision without regard to his own national law.

ARGUMENT

I

THIS COURT IS WITHOUT POWER TO ISSUE AN ORIGINAL WRIT OF HABEAS CORPUS SINCE IT HAS NEITHER ORIGINAL NOR APPELLATE JURISDICTION IN THIS CAUSE

A. THIS CASE IS NOT WITHIN THE ORIGINAL JURISDICTION OF THIS COURT

Article III, section 2, clause 2 of the Constitution of the United States provides:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The case of *Marbury v. Madison*, 1 Cranch 137, 175, firmly established that Congress has no power to confer on this Court original jurisdiction in cases other than those described

in the Constitution. This Court recently reaffirmed that doctrine in *Ex parte Peru*, 318 U. S. 578, 582, 583, footnote 3. Specifically, with relation to its statutory authority to issue writs of habeas corpus, this Court has frequently and consistently ruled that, except where the case is one within its original jurisdiction, it has power to issue such writs only in aid of its appellate jurisdiction. *Ex parte Barry*, 2 How. 65; *Ex parte Yerger*, 8 Wall. 85, 97–98; *Ex parte Lange*, 18 Wall. 163, 166; *Ex parte Siebold*, 100 U. S. 371, 374–375; *Ex parte Virginia*, 100 U. S. 339, 342–343; *Ex parte Hung Hang*, 108 U. S. 552, 553.

This is not a case affecting an Ambassador, a public Minister, or a Consul; it is not a case in which a State is a party. Hence it is not a case within the original jurisdiction of this Court.

B. Since Military Commissions Do Not Exercise Judicial Power Under Article III, Section 2, Clause 1 of the Constitution, This Court Has No Appellate Jurisdiction To Review or Revise Decisions of an International Tribunal in the Nature of a Military Commission

In the period when Congress withheld from this Court the power of direct review in criminal cases, this Court nevertheless did review jurisdic-

tional issues in such cases by means of original writs of habeas corpus. E. g., *Ex parte Bollman*, 4 Cranch 75, 100; *Ex parte Lange*, 18 Wall. 163, 166; *Ex parte Siebold*, 100 U. S. 371, 373–374; *Ex parte Virginia*, 100 U. S. 339, 342–343. This Court held in those cases that the issuance of the writ was an exercise of its appellate jurisdiction, as it was sitting in judgment and undertaking to affirm or revise the judicial action of a lower federal court. But throughout that period, when original writs by this Court had their greatest vitality, this Court constantly emphasized that this appellate jurisdiction existed because it was sitting in review of judicial action. E. g., *Ex parte Yerger*, 8 Wall. 85, 103; *Ex parte Virginia*, 100 U. S. 339, 342–343. In the same period, this Court consistently held that appellate jurisdiction did not exist when the action which it was called upon to review was not judicial action. Thus, in *Ex parte Barry*, 2 How. 65, in holding that this Court could not entertain an original writ of habeas corpus to examine into the custody of an infant, Justice Story pointed out that there was before the Court no judicial application of any kind which the Court could review. In *Ex parte Hung Hang*, 108 U. S. 552, this Court held that an arrest under a warrant issued by a police judge represented no judicial action which could be the subject of appellate jurisdiction. *In the*

matter of Metzger, 5 How. 175, this Court went so far as to hold that the action of a judge in chambers, surrendering a person sought for extradition, was not judicial action, and hence that the judge's order could not be reviewed by means of a writ of habeas corpus issued by this Court. The holding of the case that the action of the judge was not judicial action was subsequently questioned (see *Ex parte Virginia*, 100 U. S. at page 341), but none of the later cases disputed the principle that some judicial action must have occurred before a writ of habeas corpus in aid of appellate jurisdiction could be maintained. The very care with which such cases as *Ex parte Yerger*, 8 Wall. 85, 103 (upholding the right to review an order of the district court remanding a person to the custody of military authorities) and *Ex parte Virginia*, 100 U. S. 339, 342 (upholding the power of the Court to review the issuance of a bench warrant) spell out the nature of the judicial action which they are reviewing serves merely to emphasize that the supervisory appellate jurisdiction which will support a writ of habeas corpus in this Court must relate to an exercise of the judicial power conferred by Article III, section 2 of the Constitution.

The reasoning of *Ex parte Virginia*, and the other cases cited above, thus offers no support to petitioners, for it is well settled that the power

exercised by military commissions to try offenses is not an exercise of judicial power under Article III, section 2 of the Constitution. This Court so ruled in *Ex parte Vallandigham,* 1 Wall. 243, 251. It reaffirmed that ruling in *In Re Vidal,* 179 U. S. 126–127. And it has recently reasserted and reaffirmed that principle in *Ex parte Quirin,* 317 U. S. 1, 39; *In Re Yamashita,* 327 U. S. 1, 8; and in *Duncan* v. *Kahanamoku,* 327 U. S. 304, 309. As this Court said in the case last cited, "it had long been established that military tribunals are not part of our judicial system."

Since, therefore, this Court does not have, in relation to military tribunals, the kind of supervisory appellate jurisdiction which it has in relation to lower judicial courts, there is, in relation to military tribunals, no appellate jurisdiction to which a writ of habeas corpus can be an aid. Furthermore, since military tribunals composed solely of Americans exercising solely American military power do not exercise judicial power under Article III of the American Constitution, *a fortiori,* an international tribunal such as we have here—composed, not of Americans alone but of representatives of 11 nations, exercising the military power, not of the United States alone, but of nations who together waged war—does not exercise judicial power under the American Constitution. This Court manifestly has no appellate supervisory jurisdiction over such a tribunal.

C. There is No Potential Jurisdiction Over This Cause in Any Court of the United States and Thus no Potential Appellate Jurisdiction in This Court

There remains to be considered the question whether, on some theory, this cause could be brought within the original jurisdiction of some court of the United States, whose ruling would then be subject to judicial review. Such an original action could be only by a writ of habeas corpus in a district court since, as this Court recently stated in *In re Yamashita*, 327 U. S. 1, 8, with respect to military tribunals,

> Congress conferred on the courts no power to review their determinations save only as it has granted judicial power "to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."

In an ordinary cause, it would be sufficient to point out that, although this Court has gone far in recognizing potential appellate jurisdiction after the very commencement of a judicial proceeding (see *Ex Parte United States*, 287 U. S. 241; *Ex parte Virginia*, 100 U. S. 339, 342), it has, so far as we have been able to find, never gone so far as to act in aid of its appellate jurisdiction when no judicial proceeding of any kind has been commenced in a lower court. As Chief Justice Marshall said in the case of *The Alicia*,

7 Wall. 571, 573, "an appellate jurisdiction necessarily implies some judicial determination, some judgment, decree or order of an inferior tribunal, from which an appeal has been taken." At the very least, appellate jurisdiction implies some application to a court on which a judicial determination can be made. See *Ex parte Barry*, 2 How. 65. No such application exists here.

In view, however, of the extraordinary nature of this proceeding, we think that it should be made clear that no court of the United States has power to grant a writ of habeas corpus on the relation of these petitioners, or to grant them any other relief.

1. *Under the present habeas corpus statute, no district court has power to issue a writ of habeas corpus where the person on whose behalf the writ is sought is not confined within the territorial limits of the court.*

As this Court recently held in *Ahrens* v. *Clark*, 335 U. S. 188, ordinarily, a federal district court is without jurisdiction to issue a writ of habeas corpus if the person on whose behalf the writ is sought is not detained within the territorial jurisdiction of the court when the petition is filed. In that case this Court left open the question as to what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights. 333

U. S. at p. 192, fn. 4. However, the reasoning by which this Court reached its conclusion in the *Ahrens* case indicates that, where there is no detention within the district, there is a total absence of power to issue the writ, rather than a mere withholding of power in the interest of orderly administration. That conclusion—that the whole scheme of the habeas corpus statute is based on the assumption that there must be custody within the territorial jurisdiction of the court—is reinforced by the recent revision of the statute in the new Title 28 of the United States Code, the provisions of which would, of course, be applicable to any possible proceedings by these petitioners. Sec. 2242 of Title 28 has added a new provision to the former habeas corpus statute to the effect that, if an application is made to this Court or to a circuit judge, "it shall state the reasons for not making application to the district court *of the district in which the applicant is held.*" [Italics supplied.] That section clearly assumes that there must be detention within the territorial jurisdiction of a district court.

Petitioners seem to assume that some extra-territorial jurisdiction is implied in that portion of the habeas corpus statute (presently 28 U. S. C. 2241 (c) (4)) which provides that the writ shall not extend to a prisoner unless "He, being a citizen of a foreign state and domiciled

therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations." However, that section, when examined in the light of its genesis, reinforces the conclusion that Congress assumed that habeas corpus jurisdiction was determined by the place of detention.

The circumstances which gave rise to the above-quoted section are described in the decision of this Court in *In re Neagle*, 135 U. S. 1, 71–72, and in *Underhill* v. *Hernandez*, 65 Fed. 577, 581–582 (C. C. A. 2). McLeod, a British subject, and a member of the colonial forces, repelling an attack upon Canada in 1841 by an American armed force, assisted in the destruction of a vessel moored on the American shore of the Niagara river, and during the course of that engagement an American citizen was killed. McLeod was indicted for murder in the state courts of New York. The British government demanded his release on the ground that his was a public act, performed under superior orders, which could only be the subject of discussion between the two governments. The federal government accepted that view, and demanded McLeod's release, but New York refused to accede to that demand. As a result, Congress passed the Act of August 29,

1842, 5 Stat. 539, presently incorporated in 28 U. S. C. 2241 (c) (4). The avowed object of the statute (see *In re Neagle,* 135 U. S. at p. 71–72) was to prevent a State from interfering with the course of foreign affairs, which were wholly within the province of the federal government. The statute clearly assumes presence within a State and thus within the jurisdiction of a federal court. The section, therefore supports, rather than negates the view that habeas corpus jurisdiction depends on the place of detention.[3]

The common law of habeas corpus, to which recourse is properly had in interpreting our habeas corpus statute (See *McNally* v. *Hill,* 293 U. S. 131, 136), furnishes some support for the view that custody within the jurisdiction of the court is necessary to support habeas corpus jurisdiction. True, the common law authorities are not very clear, as is shown by the fact that, in the leading American case on the subject, *In the Matter of Samuel W. Jackson,* 15 Mich. 417 (1867), the judges reached directly opposite conclusions on the basis of the same historical materials. But it is significant that Holdsworth, in his *History of English Law,* v. 9, p. 116, reports that, prior to the Habeas Corpus Act of 1679, it was

[3] While the point is immaterial on the issue of the jurisdiction, it should be noted that petitioners can gain no comfort from that section since they are not now held for an "act done" but are held under the judgment of an international court.

a common abuse for jailers to "move the prisoner about to evade a service of these writs, and, in the last resort, remove him out of the jurisdiction of the court." He also refers to attempts to secure legislation "to prevent the transportation of prisoners beyond the seas, or out of the jurisdiction of the English courts" with resulting defeat of habeas corpus jurisdiction. *Id.* at p. 117. It seems, therefore, to have been assumed at common law, that detention within the jurisdiction of the court was necessary to authorize the issuance of the writ.

Thus, the structure of our habeas corpus statute, its legislative history, and historical background, support the conclusion that detention within the territorial jurisdiction of a district court is a necessary condition to the issuance of a writ of habeas corpus. If changes are to be made, Congress must make them.

2. *Even if a district court's power to issue the writ depends merely on the presence within the jurisdiction of a respondent having effective control over the person detained, no American court has jurisdiction to issue the writ since there is in the United States no respondent who has effective custody and control of the petitioners.*

Whether or not the power of a district court to issue a writ of habeas corpus depends on the place of detention, it is clear that, if the relator is detained outside the jurisdiction, there must

at least be, within the jurisdiction of the district court, a person who has such effective custody and control of the person detained that he has power to order his release. Otherwise no order of a court could be effective. No person having such effective power is within the jurisdiction of any district court of the United States.

We discuss, *infra*, Point III, the international nature of the tribunal which convicted petitioners and the consequences that flow from its international character. Here we consider that factor only from the point of view of the jurisdiction of a district court to bring before it a respondent who has power to effectuate a mandate which the court might issue regarding the release of these petitioners.

As is discussed more fully below, Point III, petitioners are held under the judgments of the International Military Tribunal for the Far East, which was established pursuant to international agreement and in accordance with a policy decision of the Far Eastern Commission composed of eleven nations. The Far Eastern Commission's policy decisions are transmitted to the Supreme Commander for the Allied Powers, the executive authority for the Allied Powers, by the United States Government through the channels of the American Joint Chiefs of Staff.

In that chain of authority the only persons who are presently within the reach of the process

of any district court of the United States are the American Joint Chiefs of Staff. But, as the Terms of Reference for the Far Eastern Commission (Articles II and III), make clear, see Documentary Appendix, pp. 15–16, the Joint Chiefs of Staff, acting for the United States Government, serve merely as a conduit to transmit the policies of the Far Eastern Commission to the Supreme Commander for the Allied Powers. The United States, whether acting through the Joint Chiefs of Staff or otherwise, has no power to deviate in its directives from the policy decisions of the Commission. In fact, Article II–A–2 of the Terms of Reference gives the Commission power to review any directive issued to the Supreme Commander for the Allied Powers. Thus, wholly aside from the fact that a mandate to the Joint Chiefs of Staff to perform an act contrary to a policy decision of the Far Eastern Commission would require the United States to violate its agreement with other nations, an order from the Joint Chiefs of Staff contrary to a policy decision of the Far Eastern Commission would not be binding on the Commission or on the Supreme Commander for the Allied Powers as the executive authority for the Allied Powers in Japan. The result is that neither the persons having immediate custody, nor the persons having ultimate and effective control of petitioners are within the reach of the process of a court of the United States. Hence, there is not within the

jurisdiction of a United States Court a proper party respondent to whom a writ of habeas corpus on behalf of the petitioners could be issued.[1]

II

Petitioners Are Citizens of and Residents in a Foreign State, Which Is Governed, Not by the United States Alone, But by the Nations Who Together Conquered Japan, and, Therefore, Petitioners Have No Standing To Assert Rights Under the Constitution and Laws of the United States.

Petitioners are citizens of and residents in Japan, a country which forms no part of the United States or its possessions. That country has been conquered, not by the United States alone, but by a group of allied nations acting in concert, all of whom have disclaimed any intention of annexing Japan. That country surrendered, not to the United States alone, but to the four major allied powers (Instrument of Surrender dated September 2, 1945, Documentary Appendix, pp. 11–12). That country is presently governed, not by the United States alone, but by the Supreme Com-

[1] Among the respondents actually named by petitioners, Secretary of National Defense James V. Forrestal, and Secretary of the Army Kenneth C. Royall, are clearly improper parties since they have no place in the chain of authority outlined above. The situation is of course very different, as applied to persons tried by Court-martial under the Articles of War, for there the Secretary of the Army does have real and effective authority.

mander for the allied nations who together conquered Japan (see *infra*, pp. ~~44–56~~ 45-58).

Under the circumstances, petitioners cannot claim any rights under the Constitution or the laws of the United States. They are foreigners in a foreign land, held in that foreign land by the sovereignty presently governing that foreign land. They happen to be held by an American, but so far as petitioners are concerned, they are held, not by an American acting for the United States alone, but by an American acting for the dominant governing authority of their country—the joint Allied Powers.[5] Petitioners, therefore, are not subject to duties under the Constitution and laws of the United States, and have no rights under the Constitution and laws of the United States.

This Court has held that a country occupied by the United States alone as the result of conquest is foreign territory which "cannot be regarded in any constitutional, legal or international sense, a part of the territory of the United States." *Neely* v. *Henkel*, 180 U. S. 109, 119. It held in that case that an American citizen, who violated a law established by the military governor of Cuba, could be extradited to Cuba for trial under Cuban law as established by the military governor, although the mode of trial in Cuba did not embody the procedural guarantees of the United

[5] See *infra*, pp. 44–56, for a more detailed discussion of the nature of the present government of Japan.

States Constitution. This Court there said that such guarantees "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." 180 U. S. at p. 122.

Manifestly, if foreign territory governed by the United States alone is territory outside the scope of the Constitution and laws of the United States, foreign territory occupied, not by the United States alone, but by the United States conjointly with its allies, is clearly not subject to the Constitution and laws of the United States. If the fact that the United States happens to take part in the military government of Japan makes the Constitution and laws of the United States applicable to Japanese citizens, then Japanese citizens are also subject to the Constitution and laws of Great Britain, China, and the Soviet Union. If any Japanese citizen, aggrieved by an American officer acting for the Allied Powers, can appeal to the courts of the United States for redress, he would also have the right to appeal to the courts of each of the occupying powers.

Petitioners are not governed by the Constitution and laws of the United States as such.

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[6] In this respect, the present case is very different from *In re Yamashita*, 327 U. S. 1, where a Japanese was tried on United States soil by a military Commission of the United States. There was no claim in that case that the American Constitution did not apply territorially. The question was merely whether Yamashita, as an enemy alien prisoner of war, could avail himself of rights under the Constitution.

They are governed by and subject to the laws of their own country, which in terms of ultimate power is controlled by a concert of nations, including the United States. Whether the person acting for the United States is properly so acting under the United States Constitution is not a matter which petitioners have standing to challenge. Before they can attack the right of anyone to act under the Constitution and laws of the United States, they must show that they have rights under the Constitution and laws of the United States. Since petitioners have no such rights, they have no standing to come into any United States court under any statute of the United States.

III

Petitioners Are Being Held Pursuant to the Judgment of an International Tribunal the Judgments of Which Are Not Subject to Review on Any Ground by This Court or by Any National Court

A. The International Military Tribunal for the Far East Is an Interntional Court Acting Under International Agreement.

1. *The Department of State's certification should be accepted*

a. There is appended to this brief a letter from the Acting Secretary of State certifying that the International Military Tribunal for the Far East

is not an American court or commission but an international court, acting under international agreement. We urge that this certification be accepted by the Court as a conclusive determination of the character of the Tribunal whose judgment petitioners attack. The establishment, by the United States together with other nations, of an international forum for the trial of war crimes, the settlement of claims, or the determination of other matters common to the participating states, is an increasingly important implement in the conduct of foreign relations. It would be a most serious interference with the proper course of our external affairs for courts of the United States, in the absence of specific Congressional directive, to decide for themselves that a given tribunal was domestic or international, where the department of the government charged with the carrying on of our foreign relations discloses that in our intercourse with other interested nations this country has agreed upon the international status of the particular forum.

For reasons well grounded in the distribution of functions in our Government (*United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319–21), this Court has always insisted that American courts "should not so act as to embarrass the executive arm in its conduct of foreign affairs." *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 35; *United States* v. *Lee*, 106 U. S. 196, 209; *Ex*

parte Peru, 318 U. S. 578, 588. The government recognized by the President as representative of a foreign sovereign state will be accepted without question (*Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *United States* v. *Belmont*, 301 U. S. 324, 330; *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 137–8), as will the "underlying policy" which governs the question of recognition by the United States (*United States* v. *Pink*, 315 U. S. 203, 229). Decision as to the nation which is sovereign over a particular piece of territory is also left to the executive. *Jones* v. *United States*, 137 U. S. 202, 212; *Foster* v. *Neilson*, 2 Pet. 253, 307–9; *Pearcy* v. *Stranahan*, 205 U. S. 257, 265. A certification by the State Department that a foreign vessel, sued in our courts, is state-owned and immune from seizure automatically leads to a dismissal of the action, whatever view of the vessel's immunity the Court would have itself taken. *Ex parte Peru*, 318 U. S. at 588–590; *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 34–6. Even treaties from which private rights flow will normally not be interpreted contrary to a definite position taken by the executive *vis à vis* a foreign country, especially where judicial intervention might well cause difficulties in the larger sphere of foreign relations. *Foster* v. *Neilson*, 2 Pet. 253, 307–9; *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415; *United States* v. *Reynes*, 9 How. 127, 153–155; *Charlton* v. *Kelly*, 229 U. S. 447, 468,

474–6; *Sullivan* v. *Kidd*, 254 U. S. 433, 442; *Factor* v. *Laubenheimer*, 290 U. S. 276, 295; cf. Jaffe, *Judicial Aspect of Foreign Relations* (1933), 71–78.

These are all applications of a general principle of judicial abstention from the domain of foreign affairs which, we believe, likewise requires the Court to accept, without further inquiry, the official statement on behalf of the executive, that the International Military Tribunal for the Far East is a true international court constituted under an international agreement. If the "judicial seizure of the vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our relations with it, that courts are required to accept and follow the executive determination that the vessel is immune" (*Ex parte Peru*, 318 U. S. 578, 588), certainly the far-greater seriousness of the present challenge, and the grave consequences of an assumption of jurisdiction, compel judicial acceptance of the political department's determination. The present occupation and military government of Japan involve many delicate and complex strands in the web of our current relations with the rest of the world community, and serious harm may follow a holding, or even an intimation, that the Military Tribunal is not the international enterprise the participating countries have taken it to be. For the Court to

assume an "antagonistic jurisdiction" (*United States* v. *Lee*, 106 U. S. 196, 209) or even to evoke an "irreconcilable difference between the executive and judicial departments" (*Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420) would, in all probability undermine the position of the country, not only in the conduct of its relations with the other powers interested in the Japanese occupation, but in the whole realm of its international dealings.

b. There is no occasion, in the present case, to formulate qualifications guarding against capricious or tyrannical abuse by the executive of the power of certification we advocate. For, in the words of Mr. Justice Jackson's statement of December 6th, the International Military Tribunal "bears the outward appearance of an international enterprise." We show below (*infra*, pp. 44-68) that this was also its true and essential nature, but, at the least, there are sufficient persuasive indicia to demonstrate that the State Department's characterization is neither arbitrary, malevolent, nor *ad hoc:* the Tribunal's members represent eleven different nations; its charter was established by the Supreme Commander for the Allied Powers in conformity with a policy decision of the Far Eastern Commission, an international body composed of the same eleven countries; the indictment charging petitioners was brought in the express name of the eleven powers

and lodged by counsel specifically and separately "acting in behalf" of each country.

2. The legal nature of the Tribunal

If the Court chooses to examine the nature and status of the International Military Tribunal for itself, its conclusion should accord with that of the State Department. The trial at which petitioners were convicted was, as part of the conduct of the war, a wholly international undertaking.

a. *The international control of Japan.*—(1) *The Potsdam Declaration and the surrender.*—In the Potsdam Declaration of July 26, 1945, the Presidents of the United States and of China, and the Prime Minister of Great Britain, proclaimed their nations' terms for the surrender of Japan.[7] (Documentary Appendix, pp. 1–3.) It was announced that until a new order had been established in Japan and until there is convincing proof that Japan's war-making power is destroyed, "points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objectives we are here setting forth." As soon as the objectives stated in the Declaration were accomplished, "the occupying forces of the Allies shall be withdrawn from Japan."[8] The Japanese Govern-

[7] The Soviet Union later adhered to the Potsdam Declaration.

[8] The Potsdam Declaration made it clear that the Allied Powers had no intention or desire to annex any part of the Japanese home islands.

ment, in its notes of August 10 and 14, 1945, accepted the terms of the Potsdam Declaration (cf. *In re Yamashita*, 327 U. S. 1, 10) and also agreed to the condition (transmitted by Secretary Byrnes "on behalf of the Governments of the United States, the United Kingdom, the Union of Soviet Socialist Republics, and China,") that "From the moment of surrender the authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander of the Allied powers who will take such steps as he deems proper to effectuate the surrender terms." (Documentary Appendix, pp. 4–9.)

The Instrument of Surrender signed by representatives of the Japanese Emperor and Government, on September 2, 1945, formally accepted the terms of the Potsdam Declaration, surrendered all Japanese armed forces, undertook "for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever action may be required by the Supreme Commander for the Allied Powers or by any other designated representative of the Allied Powers for the purpose of giving effect to that Declaration." The Instrument concluded with the statement that "the authority of the Emperor and the Japanese Government to rule the state shall be subject to the

Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender." The surrender was accepted by General MacArthur, "Supreme Commander for the Allied Powers," "for the United States, Republic of China, United Kingdom and the Union of Soviet Socialist Republics, and in the interests of the other United Nations at war with Japan."[9] It was also signed by representatives of nine powers at war with Japan: United States (by Admiral Nimitz), China, United Kingdom, USSR, Australia, Canada, France, The Netherlands, New Zealand. (Documentary Appendix, pp. 11–12.) The Japanese Emperor then issued an imperial rescript directing compliance with the surrender terms. (Documentary Appendix, pp. 13–14.)

Initial instructions to General MacArthur concerning his role of Supreme Commander were issued to him, on September 6, 1945, by the United States through the Joint Chiefs of Staff, and provided:

> 1. The authority of the Emperor and the Japanese Government to rule the State is subordinate to you as Supreme Com-

[9] General MacArthur had previously been designated, in accordance with the agreement of the United States, the United Kingdom, the USSR and China, as the Supreme Commander for the Allied Powers. (Documentary Appendix, p. 8.) The Instrument of Surrender provided that the term "Allied Powers" referred to these four nations.

mander for the Allied powers. You will exercise your authority as you deem proper to carry out your mission. Our relations with Japan do not rest on a contractual basis, but on an unconditional surrender. Since your authority is supreme, you will not entertain any question on the part of the Japanese as to its scope.

2. Control of Japan shall be exercised through the Japanese Government to the extent that such an arrangement produces satisfactory results. This does not prejudice your right to act directly if required. You may enforce the orders issued by you by the employment of such measures as you deem necessary, including the use of force.

3. The statement of intentions contained in the Potsdam Declaration will be given full effect. It will not be given effect, however, because we consider ourselves bound in a contractual relationship with Japan as a result of that document. It will be respected and given effect because the Potsdam Declaration forms a part of our policy stated in good faith with relation to Japan and with relation to peace and security in the Far East. (Dept. of State Publication 2671, Far Eastern Series 17 ("Occupation of Japan"), pp. 88–9.)

(2) *The Far Eastern Commission and the Allied Council for Japan.*—The position of the Supreme Commander with relation to the Allied Powers was later clarified by the Moscow Agreement of December 1945, acceded to by the For-

eign Ministers of the U. S. S. R., the United Kingdom, and the United States, and with the concurrence of China in its Far Eastern provisions. (Documentary Appendix, pp. 14–20.) By this Agreement, the Supreme Commander for the Allied Powers was to "issue all orders for the implemention of the Terms of Surrender, the occupation and control of Japan, and directives supplementary thereto. In all cases action will be carried out under and through the Supreme Commander who is the sole executive authority for the Allied Powers in Japan."

There was also established a Far Eastern Commission composed of representatives of the nine nations signatory to the Instrument of Surrender, plus India and the Philippine Commonwealth.[10] The Commission's functions were stated in its Terms of Reference to be (Documentary Appendix, p. 15):

> 1. To formulate the policies, principles, and standards in conformity with which the fulfillment by Japan of its obligations under the Terms of Surrender may be accomplished.

[10] Previously, there had been established, on United States initiative, the Far Eastern Advisory Commission, composed of the United States, Australia, Great Britain, Canada, China, France, India, the Netherlands, New Zealand, the Philippine Commonwealth. The Soviet Union refused to participate on the ground that the Commission would be only an advisory body. Department of State Publication 2671, Far Eastern Series 17 ("Occupation of Japan"), pp. 7–8, 67–8.

2. To review, on the request of any member, any directive issued to the Supreme Commander for the Allied Powers or any action taken by the Supreme Commander involving policy decisions within the jurisdiction of the Commission.

3. To consider such other matters as may be assigned to it by agreement among the participating Governments reached in accordance with the voting procedure provided for in Article V–2 hereunder.

Making recommendations with regard to either the conduct of military operations or territorial adjustments was specifically excluded. The Commission is enjoined to "respect existing control machinery in Japan, including the chain of command from the United States Government to the Supreme Commander and the Supreme Commander's command of occupation forces."

The Commission's policy decisions are transmitted to the United States Government, and that Government is responsible for preparing directives in accordance with these decisions and transmitting the directives to the Supreme Commander, who is charged with implementation of the directives expressing the Commission's policy decisions. The Commission takes action by a majority vote, provided that the representatives of the United States, the United Kingdom, the Soviet Union, and China all concur in the action taken (Article V–2 of the Terms of Reference).

The Terms of Reference set forth in the Moscow Agreement also provide that "The United States Government may issue interim directives to the Supreme Commander pending action by the Commission whenever urgent matters arise not covered by policies already formulated by the Commission; provided that any directives dealing with fundamental changes in the Japanese constitutional structure or in the regime of control, or dealing with a change in the Japanese Government as a whole will be issued only following consultation and following the attainment of agreement in the Far Eastern Commission." [11]

[11] The Moscow Agreement also established the Allied Council for Japan, with its seat at Tokyo, "for the purpose of consulting with and advising the Supreme Commander in regard to the implementation of the Terms of Surrender, the occupation and control of Japan, and of directives supplementary thereto." The Council's chairman is the Supreme Commander (or his Deputy) representing the United States; other members represent the U. S. S. R. and China, and one member represents jointly the United Kingdom, Australia, New Zealand and India. The Supreme Commander, "who is the sole executive authority for the Allied Powers in Japan," is to "consult and advise with the Council in advance of the issuance of orders on matters of substance, the exigencies of the situation permitting. His decisions upon these matters shall be controlling." However, "if, regarding the implementation of policy decisions of the Far Eastern Commission on questions concerning a change in the regime of control, fundamental changes in the Japanese constitutional structure, and a change in the Japanese Government as a whole, a member of the Council disagrees with the Supreme Commander (or his Deputy), the Supreme Commander will withhold the issuance of orders on these questions pending agreement thereon in the Far Eastern Commission." (Documentary appendix, pp. 18–20.)

The Commission is also authorized, on request of any member, "to review * * * any directive issued to the Supreme Commander for the Allied Powers or any action taken by the Supreme Commander involving policy decisions within the jurisdiction of the Commission" (Article II–A–2), and the Commission's decision modifying any directive or action is to be regarded as a policy decision (Article III–2).

The Far Eastern Commission first met in Washington on February 26, 1946, and has continued to function since that time. As of December 1, 1948, some fifty policy decisions have been adopted by the Commission, and directives based upon these policy decisions have been transmitted to the Supreme Commander. Prior to the effective establishment of the Commission in February 1946, various United States policy directives had been transmitted to the Supreme Commander for the Allied Powers through the Joint Chiefs of Staff. These directives have been filed with the Commission and have been subject to review and modification, and the Commission has also been authorized to formulate additional policy decisions on subjects within its Terms of Reference. As the Commission's own policy decisions have been made, new implementing directives have been forwarded through the Joint Chiefs of Staff to supersede any previous conflicting directives.

(3) *Status and character of the Supreme Commander for the Allied Powers and of the Japanese Occupation.*—The documents and agreements just summarized undeniably attest the international character of the occupation and control of Japan, as well as the international role of the Supreme Commander. In the words of the very first paragraph of the Preamble to the Far Eastern Commission's Basic Post-Surrender Policy for Japan (issued June 19, 1947): "* * * on September 2, 1945, Japan surrendered unconditionally to the Allied Powers and is now under military occupation by forces of these Powers under the command of General of the Army Douglas MacArthur, Supreme Commander for the Allied Powers." [12] (Dept. of State Publication 2888, Far Eastern Series 24 ("Activities of the Far Eastern Commission") p. 49.)

(i) The Instrument of Surrender proclaimed "the unconditional surrender to the Allied Powers" of the Japanese armed forces, and accepted the clause of the Potsdam Declaration providing for occupation of "points in Japanese territory to be designated by the Allies." This surrender was accepted by the Supreme Commander "for the United States, Republic of China, United Kingdom and the Union of Soviet

[12] The occupation troops in Japan have included units from Australia and other nations, as well as from the United States.

Socialist Republics, and in the interests of the other United Nations at war with Japan," and also, separately, by representatives of nine nations, including Admiral Nimitz as United States representative. (Documentary appendix, pp. 11–12.) The Secretary of State's message to Japan, of August 11, 1945, on behalf of the four Allied Powers, stated it as the Allied position that "the armed forces of the Allied Powers will remain in Japan until the purposes set forth in the Potsdam Declaration are achieved." (Documentary appendix, pp. 6–7.) The Allied character of the occupation, thus established by the Potsdam Declaration and the Instrument of Surrender, has been consistently recognized and maintained. The United States Initial Post Surrender Policy for Japan, approved by the President early in September 1945, stated that the "military occupation of the Japanese home islands * * * shall have the character of an operation in behalf of the principal allied powers acting in the interests of the United Nations at war with Japan." (Dept. of State Publication 2671, Far Eastern Series 17 ("Occupation of Japan"), pp. 74–5.) The Far Eastern Commission's Basic Post-Surrender Policy for Japan (of June 19, 1947), similarly provides that the "occupation shall have the character of an operation in behalf of the Powers that have participated in the war against Japan. The principle of participation in the occupation of

Japan by forces of these nations is affirmed." (Dept. of State Publication 2888, Far Eastern Series 24 ("Activities of the Far Eastern Commission"), pp. 51.)

The highest policy-making agency for the occupation is the Far Eastern Commission, an international organ representing eleven nations, and the Supreme Commander is charged with implementing the directives expressing the Commission's policy decisions. That these directives are, by agreement of the participating nations, transmitted to the Supreme Commander through the United States military chain of command does not convert the occupation into a national undertaking. Nor does the authority of the United States, also derived from the international agreement, to issue certain unilateral directives in the absence of Commission policies, impeach the Allied character of the occupation. International recognition of one nation's prime interest or special responsibility is fully compatible with an international enterprise. And since the occupying forces are military, it is certainly not unnatural to make use of the normal military channels of communication and supervision. Before issuing his own orders (on matters of substance) for the implementation of the Terms of Surrender, the occupation and control of Japan, and the supplementary directives, the Supreme Commander is required, by the Allied agreement, to

consult and advise with the Allied Council for Japan (see fn. 11, *supra*), if the exigencies of the situation permit. (Documentary Appendix, p. 19.)

(ii) By agreement with the four major nations at war with Japan, General MacArthur was designated Supreme Commander for the Allied Powers, a title which pointedly discloses the international character of his position. He signed the Instrument of Surrender for the Allied Powers and in the interests of the other United Nations at war with Japan. The Moscow Agreement recognized him as "the sole executive authority for the Allied Powers in Japan," and his powers as Supreme Commander stem from an Allied agreement formalized in the Instrument of Surrender, and the Moscow Agreement.[13] He consults regularly, under that Agreement, with the Allied Council for Japan, an international body, and implements the directives which express the policy decisions of the Far Eastern Commission, another Allied organ. He receives directives from the United States Government only in accordance with principles and procedures laid down in the Moscow Agreement. He is in command of the forces of all nations participating in the occupation of Japan.

(iii) It is plain, therefore, that the supreme dominion over Japan now is held, not by the

[13] For the scope of the Supreme Commander's authority, see further *infra*, pp. 60–67.

United States or any single nation, but internationally and jointly by a group of powers. Japan was not conquered by, and did not surrender to, any single state at war with her, but to the Allied Powers, and she is now occupied not by a single nation, but jointly by the Allied Powers, and is controlled by the Supreme Commander for the Allied Powers and the other states represented in the Far Eastern Commission. Under international law, upon a complete surrender like that of Japan, the supreme governmental authority over the conquered or subjugated territory rests with the conquering and occupying power or powers. 3 Hyde, *International Law* (2d rev. ed.) pp. 1879–1880; 7 Moore, *Digest of International Law* (1906), Sec. 1143 ("Occupied Territory and its Administration"); 1 Hackworth, *Digest of International Law* (1940), Sec. 29 ("Military Governments") pp. 144–159, esp. p. 156; *New Orleans* v. *Steamship Co.*, 20 Wall. 387, 393–4; *Dooley* v. *United States*, 182 U. S. 222, 231; *MacLeod* v. *United States*, 229 U. S. 416, 424–5. In the case of Japan and of Germany after World War II, this supreme authority now lies conjointly in a group of states, as with a condominium. Cf. 1 Hackworth, *op. cit. supra*, pp. 56–58; 1 Oppenheim, *International Law* (7th ed., Lauterpacht ed. 1948), Sec. 171, pp. 409–411; Kelsen, *The International Legal Status of Germany to be Established Immediately upon Termi-*

nation of the War (1944) 38 Am. J. Int. Law 689; Kelsen, *The Legal Status of Germany According to the Declaration of Berlin* (1945), 39 Am. J. Int. Law 518. In Germany, the four Allied Powers established the quadripartite Control Council as the supreme legislator and executive for the occupied country, and as the Allies' executive. In Japan, on the other hand, the Allies placed "the sole executive authority for the Allied Powers in Japan" in a single representative, the Supreme Commander, and deposited large policy-making functions with respect to the occupied country in a multipartite body, the Far Eastern Commission. The Supreme Commander happens to be an American Army officer, but the authority under which he functions is international, and not solely American.

b. *The International Military Tribunal for the Far East*—(1) *Basic war crimes policy.*—The apprehension, trial, and punishment of war criminals has been a major war aim and is a part of the basic post-surrender policy of all the nations participating in the war against the Axis. In the words of President Roosevelt, "when victory has been achieved, it is the purpose of the Government of the United States, as I know it is the purpose of each of the United Nations, to make appropriate use of the information and evidence in respect to these barbaric crimes of the invad-

ers, in Europe and in Asia" (9 Dept. of State Bull., No. 214, p. 62, July 31, 1943). In a resolution dealing with Nazi atrocities, Congress declared, early in 1943, that it was its sense "that those guilty, directly or indirectly, of these criminal acts, shall be held accountable and punished in a manner commensurate with the offenses for which they are responsible." Conc. Res. of March 18, 1943, 57 Stat. 721.

In the Tripartite Declaration of Moscow on German Atrocities in 1943 (9 Dept. of State Bull. 310), the London Agreement and Charter of the International Military Tribunal of August 8, 1945 13 Dept. of State Bull. 222–226), and Allied Control Council Law No. 10 of December 20, 1945, the policy as to the trial and punishment of criminals was established for Germany and her satellites. The Nuremburg trial, and the later subsidiary hearings, resulted.[14]

For Japan, the war crimes policy of the Allied Powers was first suggested in the Cairo Declaration of December 1, 1943, issued by the Presidents of the United States and of China and the Prime Minister of the United Kingdom, which proclaimed that "The Three Great Allies are fight-

[14] Provisions as to the punishment of war criminals were included in the treaties which have been signed between the Axis and Allied Powers: Treaty of Peace with Italy, part 3, article 45; Treaty of Peace with Bulgaria, article 5; Treaty of Peace with Hungary, article 6; Treaty of Peace with Rumania, article 6; Treaty of Peace with Finland, article 9.

ing this war to restrain and punish the aggression of Japan." The policy was formally stated in the Potsdam Declaration, announcing as one of the terms of Japanese surrender that "* * * stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners." Japan agreed to the Potsdam terms, including the provision as to war criminals, on August 10 and 14, 1945, and the Instrument of Surrender definitively stipulated the acceptance and fulfillment of these terms. Cf. *In re Yamashita*, 327 U. S. 1, 13.

(2) *Fundamental authority of the Supreme Commander to establish the Tribunal.*—The Supreme Commander's basic authority to provide for the trial of war criminals is grounded in the Potsdam Declaration, the declaration of the Allied powers transmitted by Secretary Byrnes to the Japanese Government on August 11, 1945,[15] and the Instrument of Surrender. Potsdam declared, as one of the proposed surrender terms, that war criminals would be punished; the Secretary's note and the Surrender Instrument signalized the agreement of the Allies that the Supreme

[15] In this note, delivered on behalf of the four powers after Japan's initial acceptance of the Potsdam terms, it was declared that "From the moment of surrender the authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander of the Allied Powers who will take such steps as he deems proper to effectuate the surrender terms." (Documentary appendix, p. 6.)

Commander was to effectuate the surrender terms; and the latter document formally incorporated the surrender terms and endowed the Supreme Commander with authority "to take such steps as he deems proper to effectuate these terms of surrender." The early instructions to the Supreme Commander (September 6, 1945) from the United States Government, clarifying his authority (*supra*, pp. 46–47), stated that his authority in Japan was supreme, and that he was to exercise his authority as he deemed proper to carry out his mission. Emphasis was laid upon the Supreme Commander's "right to act directly if required." "Full effect" was to be given to "the statement of intentions contained in the Potsdam Declaration." At Moscow, in December 1945, the four Allied Powers agreed that "the Supreme Commander shall issue all orders for the implementation of the Terms of Surrender, the occupation and control of Japan, and directives supplementary thereto," and that he was "the sole executive authority for the Allied Powers in Japan." (Documentary appendix, p. 19.)

Early in October 1945 the United States Government issued a directive embodying the Policy of the United States in Regard to the Apprehension and Punishment of War Criminals in the Far East. This directive expressly envisaged the creation by the Supreme Commander, with the

participation of other nations, of special international military courts composed of representatives of two or more of the United Nations, which would have international character and be appointed under international authority.[16] The directive was transmitted to the other Allied Powers and interested nations represented in the Far Eastern Advisory Commission (*supra*, fn. 10), and their participation in the establishment of a proposed international tribunal was suggested.[17]

(3) *Establishment of the Tribunal.*—After consultation with the nine nations which had signed the Instrument of Surrender, the Supreme Commander, acting under the authority we have described and "in order to implement the Terms of Surrender which requires the meting out of stern justice to war criminals," proclaimed (on

[16] In addition, the United States' Initial Post-Surrender Policy for Japan, transmitted to the Supreme Commander on September 6, 1945, declared, for the Supreme Commander's guidance, that "Persons charged by the Supreme Commander or appropriate United Nations agencies with being war criminals, including those charged with having visited cruelties upon United Nations prisoners or other nationals, shall be arrested, tried and, if convicted, punished" (Dept. of State Publication 2671, Far Eastern Series 17 ("Occupation of Japan"), p. 77).

[17] This directive contemplated that the Supreme Commander would obtain further authority before establishing a particular international court, and such authority was in fact later conferred.

January 19, 1946) the establishment of the International Military Tribunal for the Far East "for the trial of those persons charged individually or as members of organizations, or in both capacities, with offenses which include crimes against peace." (Documentary appendix, pp. 20–22.) On the same day, he approved the Tribunal's Charter, setting forth its constitution, jurisdiction, and functions. Judges representing and nominated by each of the nine signatory nations were appointed on February 15, 1946 by the Supreme Commander. (Documentary appendix, pp. 46–7.) By its Charter, the tribunal was to have jurisdiction to try crimes against peace, conventional war crimes, and crimes against humanity. (Documentary appendix, pp. 22–31.)

(4) *Far Eastern Commission War Crimes Policy Decision and Confirmation of the Supreme Commander's Authority.*—On April 3, 1946, the Far Eastern Commission adopted a policy decision on the Apprehension, Trial and Punishment of War Criminals in the Far East. (Documentary appendix, pp. 31–37.) This policy decision defined "war crimes" in terms substantially identical with those of the Nuremburg tribunal as follows:

> 1. The term "war crimes" as used herein, includes:
>
> *a.* Planning, preparation, initiation or waging of a war of aggression or a war

in violation of international treaties, agreements and assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

b. Violations of the laws or customs of war. Such violations shall include but not be limited to murder, ill treatment or deportation to slave labor or for any other purpose of civilian population of, or in, occupied territory, murder or ill treatment of prisoners of war or persons on the seas, or elsewhere improper treatment of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity.

c. Murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war or prosecutions on political, racial or religious grounds in execution of or in connection with any crime defined herein whether or not in violation of the domestic law of the country where perpetrated.

2. The offense need not have been committed after a particular date to render the responsible party or parties subject to arrest but, in general, should have been committed since, or in the period immediately preceding the Mukden incident of September 18, 1931. The preponderance of cases may be expected to relate to the years since the Lukouchiao incident of July 7, 1937.

With respect to international military tribunals, the policy decision provided:

> 5. The Supreme Commander for the Allied Powers should have:
>
> (a) power to appoint special international military courts (which term should be held to include tribunals of any type) composed of military, naval, or air force officers or civilians representing any two or more of the states members of the Far Eastern Commission for the trial under any applicable law, domestic or international, including the laws and customs of war, of the Far Eastern war criminals indicted by the Governments of these states, and
>
> (b) power to prescribe, subject to consultation with the representatives of those governments, rules of procedure for such courts. *The Supreme Commander shall appoint to each international court a judge nominated by each state represented on the Far Eastern Commission which signifies its desire to participate in the work of such court. In the appointment of the international courts and in all trials before them, the international character of the courts and of the authority by which they were appointed and under which they act should be properly emphasized and recognized, particularly in dealings with the Japanese people.* The Supreme Commander for the Allied Powers should have, (1) the respon-

> sibility for carrying out the judgments of any international courts appointed by him, and (2) the power to approve, reduce or otherwise alter any sentences imposed by any such courts, but not to increase the severity thereof, after consultation with the Allied Council for Japan and the Representatives in Japan of the other Powers, members of the Far Eastern Commission. [Italics supplied.]

The heavy stress on the international composition and character of these courts was deliberate and significant. Responsibility for carrying out the international court's judgment was given to the Supreme Commander ("the sole executive authority for Allied Powers in Japan," under the Moscow Agreement), but any approval or modification of the sentences was to be made only after consultation with the Allied Council for Japan and representatives of other nations interested in the occupation.

A directive based on the Commission's war crimes policy decision was transmitted to the Supreme Commander, through the Joint Chiefs of Staff, and on April 26, 1946, the Supreme Commander repealed the original Charter of the International Military Tribunal for the Far East and promulgated a charter revised so as to comply with this directive. As the charter was amended,

the Tribunal was to consist of not less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied powers from the names submitted by the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippine."[18] A Chief of Counsel designated by the Supreme Commander was to be responsible for the investigation and prosecution of charges against war criminals within the jurisdiction of the Tribunal, and any United Nations with which Japan had been at war was privileged to appoint an Associate Counsel to assist the Chief of Counsel. The definition of war crimes in the amended charter was in accordance with the definition of war crimes adopted by the Far Eastern Commission. (Documentary Appendix, pp. 37–46.)

(5) *Petitioners' trial before the International Military Tribunal.*—Petitioners' trial was conducted under the revised charter, before a tribunal of eleven members representing the eleven powers. The indictment, which was lodged on April 29, 1946, was brought in the name of these powers, and signed by the Chief of Counsel, acting on behalf of the United States, and by associate counsel each acting on behalf of one of the

[18] This amendment necessitated the appointment of additional judges nominated by India and the Philippines.

other ten participating nations.[19] (Documentary Appendix, pp. 49–79.) Each of the accused appointed American and Japanese counsel to represent him. The trial—including hearings on pleas and motions; the presentation of evidence, and argument—lasted from May 3, 1946 until April 16, 1948. The Tribunal's judgment was delivered in November 1948.

The record of petitioners' trial was transmitted directly to the Supreme Commander, as the Charter required. After consultation, in accordance with the Far Eastern Commission's war crimes policy decision, with the Allied Council for Japan and Representatives in Japan of the other powers which are members of the Far Eastern Commis-

[19] After a preliminary historical statement, the indictment declared:

"Therefore, the above named Nations by their undersigned representatives, duly appointed to represent their respective Governments in the investigation of the charges against and the prosecution of the Major War Criminals, pursuant to the Potsdam Declaration of the 20th July, 1945, and the Instrument of Surrender of the 2d September, 1945, and the Charter of the Tribunal, promulgated by the Supreme Commander for the Allied Powers on 19th January, 1946 and amended 26th April, 1946, hereby accuse as guilty, in the respects hereinafter set forth, of Crimes against Peace, War Crimes, and Crimes against Humanity, and of Common Plans or Conspiracies to commit those Crimes, all as defined in the Charter of the Tribunal, and accordingly name as the accused in this cause and as indicted on the Counts hereinafter set out in which their names respectively appear, all the above-named individuals." (Documentary Appendix, p. 52.)

sion, the Supreme Commander approved the sentences and ordered that they be carried out.

In his confirmation of the sentences, the Supreme Commander said, referring to the foundation of his authority: "In so far as my own authority extends in this case, suffice it that under the principles and procedure prescribed in full detail by the Allied Powers concerned, I can find nothing of technical commission or omission in the incidents of the trial itself of sufficient import to warrant my intervention in the judgments which have been rendered."

(6) *Summary and Conclusion.*—We have set forth, with but little argument, the materials disclosing the character of the Tribunal and the sources of the Supreme Commander's authority to establish it, because the documents themselves present the most powerful demonstration that the International Military Tribunal for the Far East is a true international court, properly established by the Supreme Commander—as the "sole executive authority for the Allied Powers in Japan" and pursuant to the governing policy declared by the Far Eastern Commission—in order to implement the surrender term concerning war crimes which was proclaimed on behalf of the Allied Powers at Potsdam. As both the original United States war crimes directive and the Far Eastern Commission's policy decision on war crimes require, the Tribunal has an international character

and the authority by which it was appointed and under which it has acted is international. As the judgment of the Tribunal put it: "This is a special Tribunal set up by the Supreme Commander under the authority conferred on him by the Allied Powers." In approving petitioners' sentences and in ordering that they be carried out, the Supreme Commander again acted as "the sole executive authority for the Allied Powers in Japan", and pursuant to responsibility expressly placed upon him by the Far Eastern Commission.[20]

B. NATIONAL COURTS CANNOT REVIEW THE JUDGMENT OR SENTENCES OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, OR ANY ACTION TAKEN TO CARRY OUT ITS JUDGMENT OR SENTENCES.

These enemy aliens have been judged and sentenced as war criminals by an international tribunal sitting in occupied Japan. In praying for writs of *habeas corpus* from this Court, they petition a domestic court of one of the nations represented in the international court to review, revise, and set aside the judgment and the sentences promulgated against them. They ask this domestic court to find that they were improperly

[20] Without question, the President of the United States could not reprieve or pardon petitioners under his constitutional power "to grant reprieves and pardons for offenses against the United States."

charged and convicted by the international court of non-existent or *ex post facto* crimes, and that their trial was biased and unfair. In undertaking a review of the convictions, this Court would necessarily have to apply either the Constitution and laws of the United States to the authority and proceedings of the International Tribunal, or it would have to impose its own views of the proper international law thought to have been misapplied by that Tribunal. We believe that is its undisputably beyond the competence of any American court—or of any national court in any country—to take either course.[21]

1. Since the International Military Tribunal was not established under American law, or pursuant to American authority, but draws its life wholly from international agreements and cooperative undertakings respecting the occupation of Japan, it cannot be bound by or subject to any national law or national court. Its source of power and authority is independent of the domestic law of the eleven participating states,

[21] Generals Yamashita and Homma were tried in the Philippine Islands, which were then under American sovereignty, by American military commissions appointed by the Commanding General of the United States Army Forces, Western Pacific, at the direction of the Commander-in-Chief, United States Army Forces, Pacific. The government did not contend in those cases (*In re Yamashita*, 327 U. S. 1; *Homma* v. *Patterson*, 327 U. S. 759) that the trials were held by international tribunals or under international authority.

and the sovereign which created it is separate and distinct from any of these nations.

Under traditional principles, "every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its territory." *Underhill* v. *Hernandez,* 168 U. S. 250, 252; *Oetjen* v. *Central Leather Co.,* 246 U. S. 297, 303–304; *Ricaud* v. *American Metal Co.,* 246 U. S. 304, 305–310; *United States* v. *Belmont,* 301 U. S. 324, 327–8; *United States* v. *Pink,* 315 U. S. 203, 233; *Luther* v. *Jones Sagor & Co.,* [1921] 3 K. B. 532; *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 357–9. And, as a "necessary corollary," our courts "will not undertake to pass upon the validity under the municipal law of another state of the acts of officials of that state, purporting to act as such." *Bernstein* v. *Van Heyghen Freres Societe Anonyme,* 163 F. 2d 246, 249 (C. A. 2), certiorari denied, 332 U. S. 772.

So as not to "imperil the amicable relations between governments and vex the peace of nations", (246 U. S. at 304) the courts refuse to examine the validity of governmental acts of a foreign nation within its own jurisdiction, even though the complaint be that of American citizens. Immeasurably more fitting and necessary is the application of the same principle to the authority,

judgments and proceedings of an international court trying enemy aliens in enemy territory under international control. For a national court to adopt an "antagonistic jurisdiction" (106 U. S. at 209; 318 U. S. at 588) and to "sit in judgment" (168 U. S. at 253) on the Tribunal's power or actions, or for the Tribunal's proceedings "to be reexamined and perhaps condemned by the courts" (246 U. S. at 304) of a participating nation would be a far more troublesome assumption of competence, in far-reaching effect, than any involving the acts of single foreign states. Once it is suggested that American courts may review the judgments of an international court or pass upon the actions of an international authority's agents, most unhappy consequences can be anticipated in the development of international affairs. Other nations cannot be expected to agree to the establishment of international courts if our domestic courts declare themselves authorized to review their holdings, on *habeas corpus* or otherwise. And if American courts arrogate such power to themselves, there is nothing to gainsay a similar competence in the courts of all other nations. Peaceful and judicial settlement of international disputes, as well as the continued growth of world law, is certain to be adversely affected. Other cooperative endeavors in which Americans are employed as agents of international bodies, such as United

Nations activities, will also suffer.[21a] The full reach of any assumption by this Court of competence in these matters cannot now be foreseen, but we emphasize the government's deep concern lest irreparable damage be done, and its hope for a complete and prompt termination of these efforts by petitioners to hamper and defeat vital international engagements.

2. The same considerations evoke application of the doctrine that our courts have no power, under the Constitution, to decide political questions directly involving relations between the United States and other nations. "The conduct of the foreign relations of our government is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302.[22]

[21a] To illustrate, the General Assembly of the United Nations has unanimously affirmed "the principles of international law recognized by Charter of the Nurnberg Tribunal and the judgment of the Tribunal." At the same time, the General Assembly took note "of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946". General Assembly Resolution 95 (1) of December 11, 1946.

[22] Cf., *Foster* v. *Neilson*, 2 Pet. 253, 307-9, 314; *The Amiable Isabella*, 6 Wheat. 1, 71; *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420; *United States ex rel. Boynton* v. *Blaine*, 139 U. S.

Here, in the course of its conduct of our international relations the executive has committed the United States to participate with other nations in the control of occupied Japan, and in the trial of Japanese war criminals by an international tribunal. That tribunal has been established under the international authority, and has tried petitioners under its Charter and the principles of law it deems applicable. Petitioners thereupon appeal to this Court, with the claim that the International Military Tribunal had no jurisdiction to try them, that the law it applied was improper, and that its proceedings were unfair. But the political agencies of our government have already passed upon—expressly or by implication—the establishment and authority of the Tribunal and the nature of the crimes it might adjudge; and all the questions petitioners can raise concerning their trial are issues which must be left to the political branches if it is to carry on its Constitutional functions of determining the course of this nation's relations with

306, 320–326; *Frelinghuysen* v. *Key*, 110 U. S. 63; *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423; *Terlinden* v. *Ames*, 184 U. S. 270, 288; *Charlton* v. *Kelly*, 229 U. S. 447, 476; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304; *Coleman* v. *Miller*, 307 U. S. 433, 454, 460; *Z. & F. Assets Realization Corp.* v. *Hull*, 311 U. S. 470, affirming 114 F. 2d 464 (App. D. C.); *United States* v. *Pink*, 315 U. S. 203; *Ex parte Peru*, 318 U. S. 578, 588–590; *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111–112

the other countries of the world. A controversy over the jurisdiction and proceedings of an international court for the trial of enemy war criminals is surely within the most exacting bounds of the types of questions confided by the Constitution exclusively to the political departments. Cf. *Z. & F. Assets Realization Corp.* v. *Hull*, 311 U. S. 470; *Frelinghuysen* v. *Key*, 110 U. S. 63; *United States ex rel. Boynton* v. *Blaine*, 139 U. S. 306; *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423 (awards of mixed claims commissions).[23]

3. Our own history as a federal nation furnishes a fruitful analogy.[24] When a state court, in the middle of the nineteenth century, attempted to review and revise, by writ of habeas corpus, the conviction by a federal court of a resident and citizen of the state, on the ground that the federal court's judgment was founded on an invalid statute, the Court was quick to strike down the intrusion. *Ableman* v. *Booth*, 21 How. 506.[25]

[23] See, especially, the opinion of the Court of Appeals for the District of Columbia in *Z. & F. Assets Realization Corp.* v. *Hull*, 114 F. 2d 464, and the concurring opinion in this Court, 311 U. S. at 490–3, expressly stating that the courts were without power to determine whether the Mixed Claims Commission, United States and Germany, made an award beyond its jurisdiction.

[24] Cf. Van Doren, *The Great Rehearsal*.

[25] The Wisconsin Supreme Court placed its decision largely on the state's essential power to protect the liberty of its citizens. *In re Booth*, 3 Wis. 157, 176–7, 103–4.

Chief Justice Taney's celebrated comments are peculiarly appropriate to the relationship between international and national courts:

> If the judicial power exercised in this instance has been reserved to the States, no offence against the laws of the United States can be punished by their own courts, without the permission and according to the judgment of the courts of the State in which the party happens to be imprisoned; for, if the Supreme Court of Wisconsin possessed the power it has exercised in relation to offences against the act of Congress in question, it necessarily follows that they must have the same judicial authority in relation to any other law of the United States; and, consequently, their supervising and controlling power would embrace the whole criminal code of the United States, and extend to offences against our revenue laws, or any other law intended to guard the different departments of the General Government from fraud or violence. And it would embrace all crimes, from the highest to the lowest; including felonies, which are punished with death, as well as misdemeanors, which are punished by imprisonment. And, moreover, if the power is possessed by the Supreme Court of the State of Wisconsin, it must belong equally to every other State in the Union, when the prisoner is within its territorial limits; and it is very certain that the State courts would not always

agree in opinion; and it would often happen, that an act which was admitted to be an offence, and justly punished, in one State, would be regarded as innocent, and indeed as praiseworthy, in another.

It would seem to be hardly necessary to do more than state the result to which these decisions of the State courts must inevitably lead. It is, of itself, a sufficient and conclusive answer; for no one will suppose that a Government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the union of the States, could have lasted a single year, or fulfilled the high trusts committed to it, if offences against its laws could not have been punished without the consent of the State in which the culprit was found. [21 How. at 514–5.][26]

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[26] The Court goes on to say:

"The judges of the Supreme Court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a Government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the State. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the State to confer it, even if it had attempted to do so; for no State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent Government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the

Once the "State judge or court [is] judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus*, nor any other process issued under State Authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress." 21 How. at 523.

Tarble's Case, 13 Wall. 397, reaffirmed this fundamental principle and applied it to forbid a state court from inquiring, on habeas corpus, into the Army's jurisdiction over a soldier held within

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General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offence against the laws of the State in which he was imprisoned." (21 How. at 515–6).

its borders.[27] And it was expressly held that the state court's jurisdiction closed once it appeared that the prisoner was held "under claim or color" of authority of the United States, whatever the real validity of the detaining officer's claim. 13 Wall. at 409, 410–11, 412.

4. It makes no difference, for review of the International Military Tribunal's judgment, that Generals MacArthur and Walker are American army officers. So far as petitioners are concerned, these respondents are acting under inter-

[27] "Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each State stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. * * * Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except in so far as such intrusion may be necessary on the part of the National Government to preserve its rightful supremacy in cases of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other." 13 Wall. at 406–408. Cf. *Covell* v. *Haymore*, 111 U. S. 176, 183; *Robb* v. *Connolly*, 111 U. S. 624, 630–4; *Claflin* v. *Houseman*, 93 U. S. 130, 137.

national, and not solely American, authority, and they hold petitioners under the judgment of the Tribunal, and in accordance with its Charter and the Far Eastern Commission's policy decision on war crimes, which placed in the Supreme Commander "the responsibility for carrying out the judgments of any international courts appointed by him". *supra*, pp. 63–4. The judgment of the International Military Tribunal at Nuremberg would hardly become reviewable in our courts because Goering and the other defendants were held in the Nuremberg jail (in the American Zone of Germany) by American army officers. The participation of American officers or civilians in the activities of the United Nations, and its affiliated bodies, does not render their actions reviewable domestically. As yet, international bodies must act through nationals of one or another state, but it is plain that national jurisdiction cannot hinge on this inescapable fact.

IV

The President, as Commander in Chief, and in the Conduct of Foreign Affairs, Had Power Under the Constitution To Join With the Allied Nations in Establishing the International Military Tribunal for the Far East

The action of the United States in joining with ten other nations to establish the International

Military Tribunal for the Far East was taken pursuant to the authority of the President under the Constitution, Art. II, Sec. 2, as "Commander in Chief of the Army and Navy of the United States," and as the organ of the United States in the field of foreign relations. The President's power to take such action, and the petitioners' detention pursuant to the judgment of that Tribunal, are here challenged by the petitioners on the following grounds: (1) the President possesses no power to enter into an agreement with other nations to define and punish offenses against the law of nations because the Constitution, Art. I, Sec. 8, vests that power exclusively in the Congress; and (2) that the definition of "Crimes against Peace" in the Charter of the International Military Tribunal for the Far East, as applied to the earlier acts of the petitioners, violates the command of the Constitution, Art. I, Sec. 9, that no *ex post facto* law shall be passed. Before discussing these contentions, it will be appropriate to review the nature and scope of the President's constitutional powers as Commander in Chief in time of war, and particularly in the government of occupied enemy territory, and in the conduct of relations with other nations.

Under the Constitution, the President as Commander in Chief is not limited in his powers to those of a troop commander. To the contrary, the powers which he may exercise over occupied

enemy territory have been broadly described by this Court in *New Orleans* v. *Steamship Co.*, 20 Wall. 387, 394, as follows:

> * * * In such cases the conquering power has a right to displace the pre-existing authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. * * *

The vesting of these powers in the President as Commander in Chief and in his subordinate military commanders has been summarized as follows:

> * * * Congress having, under its constitutional powers, declared or otherwise initiated the state of war, and made proper provision for its carrying on, the efficient prosecution of hostilities is devolved upon the President as Commander-in-chief. In this capacity, unless Congress shall specially otherwise provide, it will become his right and duty to exercise military government over such portion of the country of the enemy as may pass into the possession of

> his army by the right of conquest. In such government the President represents the sovereignty of the nation, but as he cannot administer all the details, he delegates, expressly or impliedly, to the commanders of armies under him the requisite authority for the purpose. Thus authorized, these commanders may legally do whatever the President might himself do if personally present, and in their proceedings and orders are presumed to act by the President's direction or sanction. [Winthrop, *Military Law and Precedents* (1920), p. 801.]

This statement is supported by such decisions of this Court as *Cross* v. *Harrison*, 16 How. 164; *Hamilton* v. *Dillin*, 21 Wall. 73; *Mechanics' & Traders' Bank* v. *Union Bank*, 22 Wall. 276; *Gates* v. *Goodloe*, 101 U. S. 612, 617.

More specifically it has been repeatedly held that the President and his military commanders may establish courts not provided for by the Articles of War and confer upon these courts civil and criminal jurisdiction. *Leitensdorfer* v. *Webb*, 20 How. 176; *The Grapeshot*, 9 Wall. 129; *Mechanics' & Traders' Bank* v. *Union Bank*, 22 Wall. 276.

The President's powers as Commander in Chief to deal with the conquered territory and enemies stem from the inherent purposes of the conduct of war and the occupation of enemy territory. "An important incident to the conduct of war is the adoption of measures by the military com-

mand not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." *Ex parte Quirin*, 317 U. S. 1, 28–29; *In re Yamashita*, 327 U. S. 1, 11. The President's power with respect to the conquered territory "carries with it inherently the power to guard against the immediate renewal of the conflict." *Stewart* v. *Kahn*, 11 Wall. 493, 507. He may require the destruction of enemy armaments and war industry, he may exact reparations, and he may require the surrender or take into custody the military and political leaders of the conquered nation. A fundamental precaution against revolt or the renewal of the conflict is to seize and hold the military and political leaders with the training and experience to organize and lead such actions.

In brief, a military occupation is not merely a technical state of war in which the war powers may be exercised to cope with the disruptions resulting from the war, as in *Woods* v. *Miller Co.*, 333 U. S. 138.

It is actually a continuation of hostilities—a control of the enemy territory maintained by the continued use or threat of force. The government of occupied territory is as much of a military problem as the conduct of a battle. The occupation of Japan has been relatively peaceful. But history is replete with cases in which the

occupying forces have encountered repeated and desperate revolts. Under our Constitution, in such a situation, the President as Commander in Chief would be solely responsible, so far as the United States is concerned, for the taking of all steps necessary to maintain and protect the military occupation. His responsibility for the conduct of the occupation is complete, and the Constitution must be deemed to confer upon him power commensurate with his responsibility. In military occupation, as on the battlefield, he may take whatever action he considers necessary to our military security. These are political powers the exercise of which by the President or his principal subordinates has always been regarded as unreviewable by the courts. *Mississippi* v. *Johnson,* 4 Wall. 475; *Georgia* v. *Stanton,* 6 Wall. 50. Such determinations must be made in the light of facts which are within the peculiar knowledge of the President and the military commanders—the temper of the conquered people, the past roles of the enemy leaders, the disposition of the American forces, and our relationships with other nations. These are indeed great powers, but they are inherent in the responsibilities which the Constitution imposes on the President as Commander in Chief. Almost universally, such powers are vested in a national executive. It is neither trite nor meaningless to say that the President's responsibility for his exercise of these great powers is entirely political.

In the exercise of his powers as Commander in Chief, and for any of the inherent purposes of military occupation, the President would have had ample authority, so far as this country is concerned, to provide for the indefinite detention of these petitioners without trial. In fact, he could thus have detained them indefinitely outside of Japan, as was done by Great Britain in the case of Napoleon. In fact, he had still other alternatives: he could have turned them over to another country, even with full knowledge, if such were the case, that they might be executed summarily by those governments.

It is not necessary for us to contend that, in a solely American occupation, the President, acting solely as American Commander in Chief could have established a tribunal to try the petitioners for the offenses with which they were charged. Considering the authority of the occupying power under international law, the vesting of that authority in the President under our law, and the limited exercise by Congress of its power with respect to offenses against the law of nations, it would be difficult to argue that the President was without power to so act.

In fact, however, the President did not purport to establish a wholly American tribunal. Instead, he joined with the representatives of ten other nations in establishing an international military tribunal for the trial of war crimes. Of course,

the power of the President, in the exercise of his powers as Commander in Chief, to enter into agreements with other nations respecting the military security of the United States, is unquestioned. Since such agreements relate to matters within his powers as Commander in Chief, they need no other authority. However, it is significant that the President is the sole organ of the United States in the field of foreign relations and as such gives constant expression to the public policy of the United States. In time of war, and particularly with respect to our military allies, the principal task of diplomacy is to further the military effort. From the earliest times, the President has entered into such agreements even in time of peace, and the validity of such agreements has never been successfully challenged on the ground that they might have been made the subject of treaties ratified by the Senate. An early and famous example is the Rush-Bagot Agreement of 1817 limiting naval armaments on the Great Lakes.[28] Similarly, the Presidents have entered into various agreements with Mexico whereby troops of each nation were allowed to cross the borders of the other in pursuit of ma-

[28] President Monroe apparently did not think Senatorial approval of the agreement was necessary, but a year after its execution, he submitted the correspondence to the Senate. The agreement was approved by the Senate by a two-thirds majority, but ratifications were never exchanged. 5 Moore, *A Digest of International Law*, p. 214.

randing Indians. As this Court noted in *Tucker* v. *Alexandroff*, 183 U. S. 424, 435:

> * * * While no act of Congress authorizes the executive department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander-in-chief of the military and naval forces of the United States.

In our own time, significant examples of the President's power to enter into such agreements are the Canadian-American defense agreement of 1940,[28a] and the bases-destroyer agreement with Great Britain in 1940[29] (see *Vermilya-Brown* v. *Connell*, decided December 6, 1948, No. 22). In wartime, and particularly in the waging of a coalition war as in World War II, the occasion and necessity for such agreements between military allies is frequent. The subjects of such agreements are often of supreme importance to the nation, yet no one can seriously question the President's power as Commander in Chief to make them. For example, during World War II the allied decision to give priority to the campaign against the European Axis powers was made on behalf of the United States by the President. Similarly, where we have war allies, as in World Wars I and II, the President must and

[28a] 3 Department of State Bulletin, No. 61, p. 154.

[29] See 39 Op. Atty. Gen. 484.

does enter into many arrangements and agreements on behalf of this country for the purpose of achieving effective coordination of the allied forces and resources.

Where we are engaged with allies in war against a common enemy, the necessary coordination of the allied armed forces can be achieved only by unified command. There can be no doubt of the President's power as Commander in Chief to enter into agreements with our allies for a unified command, under either an American officer or under an officer of an allied country (see *infra*, pp. 94-101). A similar act of the President as Commander in Chief was his agreement with our European allies for the division of conquered Germany into zones of occupation and the creation of the Allied Control Council to deal with other problems of the German occupation. The President's authority to enter into agreements providing for unified military operations and for joint allied control of conquered Japan clearly included the power to enter into agreements with our allies on the steps to be taken to prevent renewal of the conflict and to punish the persons guilty of war crimes.

In entering into the agreement to establish the International Military Tribunal for the Far East, the representative of the United States was dealing with other governments. That agreement is inherently a blending or compromise of the poli-

cies of the various participating nations. So, the precise question becomes whether there are limitations in American domestic law which restrict or limit the President's power to enter into an agreement with other nations for the punishment of war crimes, although the other participating nations are not so limited. Almost axiomatically, there are no such limits. "As a member of the family of nations, the right and power of the United States in that [international] field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. * * * the power to make such international agreements as do not constitute treaties in the constitutional sense * * * none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. This the court recognized, and in each of the cases cited found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations." *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 318. The point is graphically illustrated by the petitions in the instant cases. The petitioners do not dispute the power and right of the other ten nations represented in the Far Eastern Commission to provide by agreement for the establishment of the International Military Tribunal for the Far East; rather, they challenge only the power of the Pres-

ident to join in that agreement on behalf of the United States. If petitioners are correct, then in this and perhaps other aspects of the military occupation of Japan, the other occupying powers possess powers which this Government may not exercise.

This anomalous result is said to follow from the fact that the Constitution empowers Congress to define and punish offenses against the law of nations. Whatever might be the limit on the President's powers if Congress had ever purported to define exhaustively offenses against the law of nations, the fact remains that Congress has never done so. Thus, there is not involved in this case any conflict between what the President has done and what Congress has prescribed. But more important, the purpose of this clause of the Constitution, Art. I, Sec. 8, was to vest in the Federal government, to the exclusion of the States, the power to define and punish offenses against the law of nations, as an element of the exclusive control over foreign relations to be vested in the national government. Madison, in *The Federalist*, No. 42. That clause was not intended to make offenses against the law of nations definable only by Congress in the form of specific statutes. It cannot be doubted that the United States by a treaty could join with other nations in defining offenses against the law of nations and in prescribing the punishment for such offenses. There

can hardly be a more appropriate subject for international agreement, as Congress has indicated by leaving the definition of the offenses which may be tried by American military commissions "to the rules and precepts of the laws of nations." Indeed, apart from such offenses as piracy, international agreement is inherently the only method by which offenses against the law of nations can be defined. And so this Court has recognized that offenses against the law of nations may be defined in treaties to which this nation is a party. *Ex parte Quirin*, 317 U. S. 1, 27–35; *In re Yamashita*, 327 U. S. 1, 7–8.

It by no means follows, however, that a formal treaty is the only method by which this government may join with other nations in defining and prescribing punishment for offenses against the law of nations arising out of war. The President as the Commander in Chief under the Constitution must have power to determine, in agreement with our military allies, what should be done to carry out the policy of this nation, and the policies of the other participating nations, to punish war criminals. The established policy of the United States is manifest not only from the Potsdam Declaration, but from similar expressions of Congressional sentiment which reflect an assumption that the appropriate powers already exist. In 1943, a concurrent resolution dealing with Nazi atrocities the Senate declared "that it is the sense

of this Congress that those guilty, directly or indirectly, of these criminal acts shall be held accountable and punished in a manner commensurate with the offenses for which they are responsible."[30] In 1945, a similar resolution relating to all war crimes was passed by the House of Representatives.[31] Indeed, as this Court noted in the *Yamashita* case, that policy is embodied in the terms of the Japanese surrender. Moreover, the President took similar action in joining with our European allies in establishing the International Military Tribunal which sat at Nuremberg and the judgments of which have been carried out.

The precise question is whether, at least where Congress has not taken inconsistent action, the President, representing the United States in the allied occupation of Japan, may exercise on behalf of this country as broad powers as the other occupying powers. It is our position that to the extent that offenses against the law of nations relate to the commencement and conduct of war, the President, as Commander in Chief, may enter into agreements with our military allies defining and punishing such offenses. Such power is inherent in his obligations to bring war criminals to justice, to prevent renewal of the conflict and to protect the occupying forces. Whether the President's power in this respect would be

[30] Conc. Res. of Mar. 18, 1943 (57 Stat. 721).

[31] H. Conc. Res. 39, 79th Cong., 1st sess.

limited by the extent to which Congress had exercised its power to define and punish offenses against the law of nations is not in issue. Since Congress has not acted, the only question is whether the President, by agreement with the other governments, may exercise the same powers as to war crimes as are exercised by such other governments. *United States* v. *Curtiss-Wright Corp., supra,* stands for the proposition that the President must exercise on behalf of the United States powers equal to those of the other nations involved, for otherwise the United States would play a subordinate role in determining with other nations matters of great importance.

These same considerations compel the conclusion that the President, in entering into an agreement with other governments for the trial and punishment of war crimes, is not restricted by such limitations of our domestic law as the provision of the Constitution, Art. I, Sec. 9, that "no *ex post facto* law shall be passed." Without in any way conceding that the trial of petitioners violates the *ex post facto* principle of our Constitution, it is our position that that clause has no application here. In the first place, it should be noted that this provision by its terms is limited to legislation—it is a restriction upon the power of Congress to legislate. Also, it is established that the prohibition against *ex post facto* laws is applicable only to criminal statutes, *Calder* v.

Bull, 3 Dallas 386, and presumably this means statutes defining offenses against the United States. The petitioners, of course, were not tried for offenses against the laws of the United States, but for the offenses defined by the agreement of eleven nations. Assuming, therefore, that the President had authority generally to enter into such an agreement, and assuming (what we do not concede) that the definition of such offenses in an act of Congress would violate the *ex post facto* clause of the Constitution, is the President restricted to such agreements as satisfy the prohibition of the *ex post facto* clause? This is a serious issue. An international agreement to define and punish war crimes inherently involves a compromise of the desires and legal policies of the participating nations. This is true whether what is involved is an agreement made by the President as Commander in Chief or a formal treaty. To conclude that the domestic legal policies of the United States must govern the content of any such agreement to which the United States is a party would create intolerable uncertainty as to whether our concurrence was effective. Similarly, if each of the other nations takes the same position, it would probably be impossible for nations to act jointly in the development of international order. In any realistic view, the participation of this country in the agreement for the definition and punishment of war crimes

is a political and military decision to which the *ex post facto* clause of the Constitution by its terms has no more application than it does to the retrospective operation of judicial decisions. See *Ross* v. *Oregon*, 227 U. S. 150.

Of course, the question actually presented is not whether the general principle against retroactive criminal legislation should be applicable to the definition and punishment of war crimes. Even assuming, what may or may not be true, that all civilized legal systems follow this general principle, there is room for much divergence of views on the application of the ex post facto principle to particular circumstances. Thus, petitioners' real contention is that this nation may not participate in an international agreement defining and punishing war crimes except upon the condition that our rule against *ex post facto* criminal legislation is applied in exactly the same way as our courts would apply it to acts of Congress under the same circumstances. It need not be labored that any attempt by the United States to impose such conditions would be resented by other governments and would probably preclude the United States from participating in any such agreements.

The issue is not limited to war crimes or to the *ex post facto* doctrine. If the United States is to participate with other nations in the development of international law generally, it must be

on the basis of compromise and on the assumption that the representatives of other legal systems are as zealous as ourselves in seeking to administer fundamental justice.

V

Even Assuming that the President was Without Power to Join with Other Nations in the Establishment of the International Military Tribunal for the Far East, the Fact Remains that it was Established by 10 Other Nations and that General MacArthur, as Supreme Commander, May Act as Their Agent in Establishing the Tribunal and in Carrying out its Judgments.

Assuming with petitioners that there was no power in the President or any executive or military officers of the United States to participate in the establishment of the International Military Tribunal for the Far East, the following *facts* remain: General MacArthur, acting as Supreme Commander for the Allied Powers, made the petitioners available for trial by the Tribunal, they were tried and sentenced by the Tribunal, and General MacArthur, as Supreme Commander, has directed that the sentences be carried out.

As shown above, the International Military Tribunal for the Far East is not an American tribunal—it is an international tribunal. Even if petitioners are correct in their view as to the lack of executive power to participate in the crea-

tion of the Tribunal, there remains an agreement among the other ten countries associated with this country in the Far Eastern Commission and there still remains the Tribunal created pursuant to that agreement. No American court has jurisdiction to question the validity of the policy decision of the Far Eastern Commission after subtracting therefrom the participation of the United States. The effect of a declaration that American participation was illegal, upon the constitution of the Tribunal and the validity of its proceedings, can not be determined by this Court.

Since there exists, despite any conclusion or action of this Court, an agreement by ten nations other than the United States for the establishment of a tribunal to try Japanese war criminals; petitioner must attack the functions performed by General MacArthur and the American armed forces in the establishment and operation of the International Military Tribunal for the Far East and in the execution of its judgment. These functions consisted of the following: (1) General MacArthur, as Supreme Commander, implemented the international agreements for the trial of war criminals by preparing and issuing the Charter of the International Military Tribunal for the Far East; (2) as Supreme Commander, and pursuant to the Charter, he appointed 11 members of the Tribunal from nominations from the 11 nations (Charter, Art. 2); (3) as Su-

preme Commander, and pursuant to the Charter, he designated a Chief of Counsel to be responsible for the investigation and prosecution of charges against war criminals (Charter, Art. 8 (a)); (4) as Supreme Commander, he made the petitioners, who had previously been arrested by the Allied Forces, available for trial; (5) as Supreme Commander, he approved, pursuant to Article 17 of the Charter, the judgments of the Tribunal; and (6) as Supreme Commander, he has directed that the sentences imposed upon petitioners be carried out.

The performance of these functions by General MacArthur as Supreme Commander is challenged by the petitioners on the ground that in so doing he accepted "an office, title and place of trust from ten (10) foreign governments without consent of the Congress", in violation of the U. S. Const., Art. I, Sec. 9. That clause provides that, "No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state."

The war in the Pacific was a coalition war. The attack on Pearl Harbor on December 7, 1941, and the contemporary events found Japan at war not only with the United States but also with Great Britain, China, Netherlands, Aus-

tralia and New Zealand. Similarly, in the recent war with the European Axis powers, we had allies. In the Pacific campaign, unified command of the operations of the Allied Forces was achieved in various ways. In Western Europe, General Eisenhower of the United States Army was the Supreme Allied Commander. It is a fact that the supreme commander in coalition warfare acts for and is responsible to the governments participating in the military coalition. Petitioner's contention, based on the Const., Art. I, Sec. 9, amounts to saying that the Constitution prohibits any American army or naval officer from exercising the supreme command of the armed forces of nations joined with us in war against a common enemy.

This contention is made too late in American history. The nation was born of a military coalition of the original colonies against Great Britain. As early as June 16, 1775, three months after Lexington, the Continental Congress appointed Washington to be "general and commander in chief, of the army of the United Colonies, and of all the forces now raised, or to be raised, by them." *Journals of the American Congress,* 1774–78, Way & Gideon, 1823, pp. 83–85. Six years later, in Article VI of the Articles of Confederation we find almost verbatim the present language of the Constitution, Art. I, Sec. 9, which petitioners assert precludes an

American Army officer from acting as the commander or agent of a military coalition to which the United States is a party. It is absolutely incredible that the same men who recognized the necessity for unified command at the outset of the Revolution intended by this clause to prevent any American from exercising unified command over American troops and troops of other nations allied with us in war. Not until 1918 did the problem of unified command in coalition warfare present itself. Then we did not hesitate to subject American troops to the supreme command of Marshal Foch of the French Army. Art. I, Sec. 9, of the Constitution has never been construed by this Court. It has been construed by the Attorney General in respects not relevant here, and it has been interpreted by Congress in legislation authorizing officers of the United States to accept foreign decorations. See, for example, the Act of July 20, 1942, 56 Stat. 662; 10 U. S. C. 1423a. In the Convention of 1787, the clause was suggested by Charles Pinckney, who "urged the necessity of preserving foreign Ministers, and other officers of the U. S., independent of external influence."[32] Until now, it was never suspected that this purpose of preserving the undivided loyalty of officers of the United States by forbidding their acceptance of honors, compensation or gifts from foreign

[32] Debates, August 23, 1787.

governments, also prohibited any American officer from exercising allied command in a coalition war.

The President, as Commander in Chief of the armed forces of the United States, has undisputed power to select the officers to command the armed forces in time of war. Also as Commander in Chief, and by agreement with allied governments, he may and has designated American officers to act as the Supreme Commander of our own and allied armed forces. Where military allies are fighting together under unified command, the Supreme Commander has the same responsibility for bringing to trial and punishment violators of the laws of war and other war criminals as does the commander of a purely national force.

Since General MacArthur was validly designated by the President, in agreement with our allies, as the Supreme Commander of the Allied Forces, his powers in dealing with the problems arising out of the war are not limited to those which he would possess if he were acting solely as an American military commander. His powers as the agent and representative of the Allied Powers must be as great as those which could be exercised, say, by a British or Australian officer in that position. We assume that if an Australian officer were acting as Supreme Commander for the Allied Forces, he would not consider himself precluded by anything in American domestic law from carrying out

the international agreement embodied in the war crimes policy of the Far Eastern Commission. We assume that General MacArthur acting as Supreme Commander similarly would not feel restrained by any Australian domestic law. In brief, when an American officer assumes the post of Supreme Commander it is inherent in that post that he must carry out the policies of the group of nations involved as determined by whatever voting or other arrangement they have agreed upon. While he acts as their agent, he may not subordinate their policy decisions to the domestic legal rules of his own country. Clearly, therefore, General MacArthur, as the representative of the Allied Powers, may exercise the power delegated by them, without participation by the United States if the latter so desires, to establish an international tribunal for the trial of war crimes as defined by the Allied Powers, and, also as the agent of such Allied Powers, execute the sentences of the tribunal.[33]

[33] It should also be noted that petitioners challenge the Supreme Commander's power to provide "for the trial of 'conventional war crimes in violation of the customs and usages of war' in any court other than a national court or commission." It is enough to point out, as shown earlier in this brief, that the Far Eastern Commission policy decision of April 3, 1946, specifically contemplated that the Supreme Commander would establish an international military tribunal. Accordingly, it is not necessary to argue, although we think it clear, that as an incident of joint military operations and of a joint military occupation the President through military commanders may establish with our allies joint military tribunals for the trial of conventional war crimes.

CONCLUSION

The judgments against the petitioners, enemy aliens, were made by an international tribunal established by agreement among eleven nations. The Supreme Court has no authority to review the actions of such international tribunals.

The President's agreement with our allies to punish the commission of the war crimes charged in the indictments against the petitioners was a military and political decision. This Court has no jurisdiction to review such decisions by the President of the United States as Commander in Chief, made either alone or in concert with the representatives of other nations.

We respectfully submit that the motions for leave to file petitions for writs of habeas corpus should be denied.

PHILIP B. PERLMAN,
Solicitor General.

ARNOLD RAUM,
ROBERT W. GINNANE,
Special Assistants to the Attorney General.

OSCAR H. DAVIS,
BEATRICE ROSENBERG,
Attorneys.

JOSEPH B. KEENAN,
Chief of Counsel for the Prosecution before the International Military Tribunal for the Far East.

THOMAS H. GREEN,
Major General,
The Judge Advocate General,
United States Army.

DECEMBER, 1948

APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION

Article I, Section 8:

The Congress shall have Power * * *

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

* * *

Article I, Section 9:

* * * * *

No Bill of Attainder or ex post facto Law shall be passed.

* * * * *

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Article II, Section 1:

The executive Power shall be vested in a President of the United States of America.

* * * * *

Section 2:

The President shall be Commander in Chief of the Army and Navy of the United States, and of

the Militia of the several States, when called into the actual Service of the United States.

Article III, Section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

STATUTES

Title 28, U. S. C., Secs. 2241–42

Section 2241. Power to grant writ.

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their

respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court any justice thereof and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

Section 2242. Application.

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

APPENDIX B

LETTER FROM THE ACTING SECRETARY OF STATE

DEPARTMENT OF STATE,
Washington, December 14, 1948.

In reply refer to
L/M

MY DEAR MR. PERLMAN: You have requested the views of the Department of State as to whether the International Military Tribunal for the Far East is to be regarded as an international court appointed and acting under international authority, or as an American tribunal appointed and acting under the unilateral authority of the United States and specifically whether it regards the action of the Supreme Commander for the Allied Powers in proclaiming the establishment of the International Tribunal for the Far East, approving and amending the charter of that Tribunal, appointing as judges of the Tribunal the persons nominated by the individual governments represented on the Far Eastern Commission, and approving, after consultation, the sentences imposed by the Tribunal, as being in accordance with Paragraph 5 of the Far Eastern Commission policy decision of April 3, 1946, and as taken in accordance with the authority and direction of the Far Eastern Commission.

In answer to your first question, the Department of State regards the International Military Tribunal for the Far East as an international court, appointed and acting under international authority.

The Potsdam Declaration of July 26, 1945 defining the terms for Japanese surrender, issued by the President of the United States, the President of the National Government of the Republic of China, and the Prime Minister of Great Britain stated that "stern justice shall be meted out to all war criminals."

The Supreme Commander for the Allied ~~Forces~~ Powers in Japan was appointed on August 13, 1945 by agreement of the President of the United States and Generalissimo Chiang Kai-shek, Prime Minister Churchill and Premier Stalin. In the view of the Department of State, this action of the President was taken in accordance with his powers as Commander in Chief and in execution of the control vested in him over the conduct of the foreign relations of the United States.

On October 4, 1945, the United States issued a directive to the Supreme Commander for the Allied Powers authorizing him to establish special international military courts for the trial of Far Eastern war criminals, subject to further authorization from the United States Joint Chiefs of Staff, in respect to the establishment of international courts for the trial of persons charged with crimes against peace. Such authorization was subsequently given to him provided that nominations of judges for such tribunal were received from other Governments. The directive of October 4, together with the statement of the policy of the United States on which it was based, was circulated on October 24, 1945 to the Far Eastern Advisory Commission, which preceded the Far Eastern Commission and which was com-

posed of representatives of the United Kingdom, the United States, China, France, the Netherlands, Canada, Australia, New Zealand, India and the Philippine Commonwealth. Previously, on October 18, 1945, the Department of State had also transmitted a copy of the statement of the policy of the United States to the governments signatory to the Japanese surrender, and requested them to designate persons qualified for membership on the international military courts contemplated in order to permit the Supreme Commander for the Allied Powers to appoint suitable members. On January 19, 1946, the Supreme Commander issued a proclamation stating that "there shall be established an International Military Tribunal for the Far East." On the same day, in General Orders No. 1, he approved the charter of the Tribunal, pursuant to which, on February 15, 1946, he appointed judges on the Tribunal.

The Department of State regards the tribunal established pursuant to the Proclamation and General Orders just mentioned as an international tribunal appointed under international authority. In its view, a tribunal appointed by an international officer, consisting of members nominated by the governments which he represents and which at the time of such nomination were fully informed of the directive and statement of policy pursuant to which he acted, is an international tribunal.

In the meantime, by the Moscow Agreement of December 27, 1945, the Far Eastern Commission had been set up by the United States, the United

Kingdom and the Union of Soviet Socialist Republics, with the concurrence of China. On April 3, 1946, the Far Eastern Commission adopted a policy decision regarding the apprehension, trial and punishment of war criminals in the Far East which provided, *inter alia*, that the Supreme Commander of the Allied Powers "should have: (a) power to appoint special international military courts" and that he "shall appoint to each international court a judge nominated by each state represented on the Far Eastern Commission which signifies its desire to participate in the work of such court." The United States Government prepared a directive in accordance with this policy decision which was transmitted on April 23, 1946 to the Supreme Commander through the United States Joint Chiefs of Staff, as provided in Article III–1 of the terms of reference of the Far Eastern Commission. Thereafter, on April 26, 1946, the Supreme Commander issued General Orders No. 20 which specifically "superseded" General Orders No. 1 and incorporated the requirements of the Far Eastern Commission policy decision in regard to the membership of any international court appointed by him which differed from the provisions as to membership set forth in General Orders No. 1. The Tribunal with which the indictment of the major Japanese war criminals was filed and which tried and convicted the accused was the Tribunal constituted pursuant to General Orders No. 20.

Accordingly, in reply to the second question referred to in the first paragraph of this letter, the Department of State considers that the Supreme

Commander's action in proclaiming that an International Military Tribunal for the Far East should be established and in approving the original charter and appointing judges thereunder was taken under international authority, was consistent with the subsequent policy decision of the Far Eastern Commission and was approved by that decision subject only to the requirement of two additional judges. The Department further considers that the Supreme Commander's action superseding the original charter by an amended charter, appointing as judges of the tribunal persons nominated by all of the individual governments represented on the Far Eastern Commission, and approving, after consultation, the sentences imposed by the Tribunal was taken specifically under the authority and policy direction of the Far Eastern Commission.

Sincerely yours,

(Sgd.) ROBERT A. LOVETT.

The Honorable PHILIP B. PERLMAN,
Solicitor General.

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Nos. 239, 240, and 248 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1948

KOKI HIROTA, PETITIONER

v.

GENERAL OF THE ARMY DOUGLAS MACARTHUR, ET AL.

KENJI DOIHARA, PETITIONER

v.

GENERAL OF THE ARMY DOUGLAS MACARTHUR, ET AL.

KOICHI KIDO, TAKASUMI OKA, KENRYO SATO, SHIGETARO SHIMADA AND SHIGENORI TOGO, PETITIONERS

v.

GENERAL OF THE ARMY DOUGLAS MACARTHUR, ET AL.

ON MOTIONS FOR LEAVE TO FILE PETITIONS FOR WRITS OF HABEAS CORPUS

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APPENDIX

I

Proclamation Defining Terms for Japanese Surrender

(The Potsdam Proclamation)

(July 26, 1945)

(1) We—The President of the United States, the President of the National Government of the Republic of China, and the Prime Minister of Great Britain, representing the hundreds of millions of our countrymen, have conferred and agree that Japan shall be given an opportunity to end this war.

(2) The prodigious land, sea and air forces of the United States, the British Empire and of China, many times reinforced by their armies and air fleets from the west, are poised to strike the final blows upon Japan. This military power is sustained and inspired by the determination of all the Allied Nations to prosecute the war against Japan until she ceases to resist.

(3) The result of the futile and senseless German resistance to the might of the aroused free peoples of the world stands forth in awful clarity as an example to the people of Japan. The might that now converges on Japan is immeasurably greater than that which, when applied to the resisting Nazis, necessarily laid waste to the lands, the industry and the method of life of the whole German people. The full application of our mili-

tary power, backed by our resolve, *will* mean the inevitable and complete destruction of the Japanese armed forces and just as inevitably the utter devastation of the Japanese homeland.

(4) The time has come for Japan to decide whether she will continue to be controlled by those self-willed militaristic advisers whose unintelligent calculations have brought the Empire of Japan to the threshold of annihilation, or whether she will follow the path of reason.

(5) Following are our terms. We will not deviate from them. There are no alternatives. We shall brook no delay.

(6) There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.

(7) Until such a new order is established *and* until there is convincing proof that Japan's war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objectives we are here setting forth.

(8) The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.

(9) The Japanese military forces, after being completely disarmed, shall be permitted to return to their homes with the opportunity to lead peaceful and productive lives.

(10) We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.

(11) Japan shall be permitted to maintain such industries as will sustain her economy and permit the exaction of just reparations in kind, but not those which would enable her to re-arm for war. To this end, access to, as distinguished from control of, raw materials shall be permitted. Eventual Japanese participation in world trade relations shall be permitted.

(12) The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished and there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government.

(13) We call upon the government of Japan to proclaim now the unconditional surrender of all Japanese armed forces, and to provide proper and adequate assurances of their good faith in such action. The alternative for Japan is prompt and utter destruction.

II

First Japanese Offer of Surrender

(August 10, 1945)

The Honorable James F. Byrnes,
Secretary of State.

Sir: I have the honor to inform you that the Japanese Minister to Switzerland, upon instructions received from his Government, has requested the Swiss Political Department to advise the Government of the United States of America of the following:

"In obedience to the gracious command of His Majesty the Emperor who, ever anxious to enhance the cause of world peace, desires earnestly to bring about a speedy termination of hostilities with a view to saving mankind from the calamities to be imposed upon them by further continuation of the war, the Japanese Government several weeks ago asked the Soviet Government, with which neutral relations then prevailed, to render good offices in restoring peace vis a vis the enemy powers. Unfortunately, these efforts in the interest of peace having failed, the Japanese Government in conformity with the august wish of His Majesty to restore the general peace and desiring to put an end to the untold sufferings entailed by war as quickly as possible, have decided upon the following.

"The Japanese Government are ready to accept the terms enumerated in the joint declaration

which was issued at Potsdam on July 26th, 1945, by the heads of the Governments of the United States, Great Britain, and China, and later subscribed by the Soviet Government, with the understanding that the said declaration does not comprise any demand which prejudices the prerogatives of His Majesty as a Sovereign Ruler.

"The Japanese Government sincerely hope that this understanding is warranted and desire keenly that an explicit indication to that effect will be speedily forthcoming."

In transmitting the above message the Japanese minister added that his Government begs the Government of the United States to forward its answer through the intermediary of Switzerland. Similar requests are being transmitted to the Governments of Great Britain and the Union of Soviet Socialist Republics through the intermediary of Sweden, as well as to the Government of China through the intermediary of Switzerland. The Chinese Minister at Berne has already been informed of the foregoing through the channel of the Swiss Political Department.

Please be assured that I am at your disposal at any time to accept for and forward to my Government the reply of the Government of the United States.

Accept [etc.]

GRÄSSLI,
Chargé d'Affairs ad interim
of Switzerland.

III

Reply to First Japanese Offer of Surrender

(August 11, 1945)

Mr. Max Grässli,
Chargé d'Affaires ad interim
of Switzerland

Sir: I have the honor to acknowledge receipt of your note of August 10, and in reply to inform you that the President of the United States has directed me to send to you for transmission by your Government to the Japanese Government the following message on behalf of the Governments of the United States, the United Kingdom, the Union of Soviet Socialist Republics, and China:

"With regard to the Japanese Government's message accepting the terms of the Potsdam proclamation but containing the statement, 'with the understanding that the said declaration does not comprise any demand which prejudices the prerogatives of His Majesty as a sovereign ruler,' our position is as follows:

"From the moment of surrender the authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander of the Allied powers who will take such steps as he deems proper to effectuate the surrender terms.

"The Emperor will be required to authorize and ensure the signature by the Government of Japan and the Japanese Imperial General Headquarters of the surrender terms necessary to carry out the provisions of the Potsdam Declaration,

and shall issue his commands to all the Japanese military, naval and air authorities and to all the forces under their control wherever located to cease active operations and to surrender their arms, and to issue such other orders as the Supreme Commander may require to give effect to the surrender terms.

"Immediately upon the surrender the Japanese Government shall transport prisoners of war and civilian internees to places of safety, as directed, where they can quickly be placed aboard Allied transports.

"The ultimate form of government of Japan shall, in accordance with the Potsdam Declaration, be established by the freely expressed will of the Japanese people.

"The armed forces of the Allied Powers will remain in Japan until the purposes set forth in the Potsdam Declaration are achieved."

Accept [etc.]

JAMES F. BYRNES,
Secretary of State.

IV

JAPANESE ACCEPTANCE OF POTSDAM PROCLAMATION

STATEMENT BY PRESIDENT TRUMAN

(August 14, 1945)

I have received this afternoon a message from the Japanese Government in reply to the message forwarded to that Government by the Secretary of State on August 11. I deem this reply a full acceptance of the Potsdam Declaration which specifies the unconditional surrender of Japan. In the reply there is no qualification.

Arrangements are now being made for the formal signing of surrender terms at the earliest possible moment.

General Douglas MacArthur has been appointed the Supreme Allied Commander to receive the Japanese surrender. Great Britain, Russia, and China will be represented by high-ranking officers.

Meantime, the Allied armed forces have been ordered to suspend offensive action.

The proclamation of V–J Day must wait upon the formal signing of the surrender terms by Japan.

Following is the Japanese Government's message accepting our terms:

"Communication of the Japanese Government of August 14, 1945, addressed to the Governments of the United States, Great Britain, the Soviet Union, and China:

"With reference to the Japanese Government's note of August 10 regarding their acceptance of the provisions of the Potsdam declaration and the reply of the Governments of the United States, Great Britain, the Soviet Union, and China sent by American Secretary of State Byrnes under the date of August 11, the Japanese Government have the honor to communicate to the Governments of the four powers as follows:

"1. His Majesty the Emperor has issued an Imperial rescript regarding Japan's acceptance of the provisions of the Potsdam declaration.

"2. His Majesty the Emperor is prepared to authorize and ensure the signature by his government and the Imperial General Headquarters of the necessary terms for carrying out the provi-

sions of the Potsdam declaration. His Majesty is also prepared to issue his commands to all the military, naval, and air authorities of Japan and all the forces under their control wherever located to cease active operations, to surrender arms and to issue such other orders as may be required by the Supreme Commander of the Allied Forces for the execution of the above-mentioned terms."

V

Notification to Japanese Government of Acceptance of Surrender Offer, and Surrender Orders

(August 14, 1945)

Max Grässli, Esquire,
Chargé d'Affaires ad interim of Switzerland.

Sir: With reference to your communication of today's date, transmitting the reply of the Japanese Government to the communication which I sent through you to the Japanese Government on August 11, on behalf of the Governments of the United States, China, the United Kingdom, and the Union of Soviet Socialist Republics, which I regard as full acceptance of the Potsdam Declaration and of my statement of August 11, 1945, I have the honor to inform you that the President of the United States has directed that the following message be sent to you for transmission to the Japanese Government:

"You are to proceed as follows:

"(1) Direct prompt cessation of hostilities by Japanese forces, informing the Supreme Commander for the Allied Powers of the effective date and hour of such cessation.

"(2) Send emissaries at once to the Supreme Commander for the Allied Powers with information of the disposition of the Japanese forces and commanders, and fully empowered to make any arrangements directed by the Supreme Commander for the Allied Powers to enable him and his accompanying forces to arrive at the place designated by him to receive the formal surrender.

"(3) For the purpose of receiving such surrender and carrying it into effect, General of the Army Douglas MacArthur has been designated as the Supreme Commander for the Allied Powers, and he will notify the Japanese Government of the time, place and other details of the formal surrender."

Accept [etc.]

JAMES F. BYRNES,
Secretary of State.

VI

Instrument of Surrender

September 2, 1945 (Tokyo Time)

We, acting by command of and in behalf of the Emperor of Japan, the Japanese Government and the Japanese Imperial General Headquarters, hereby accept the provisions set forth in the declaration issued by the heads of the Governments of the United States, China and Great Britain on 26 July 1945 at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics, which four powers are hereafter referred to as the Allied Powers.

We hereby proclaim the unconditional surrender to the Allied Powers of the Japanese Imperial General Headquarters and of all Japanese armed forces and all armed forces under Japanese control wherever situated.

We hereby command all Japanese forces wherever situated and the Japanese people to cease hostilities forthwith, to preserve and save from damage all ships, aircraft, and military and civil property and to comply with all requirements which may be imposed by the Supreme Commander for the Allied Powers or by agencies of the Japanese Government at his direction.

We hereby command the Japanese Imperial General Headquarters to issue at once orders to the Commanders of all Japanese forces and all forces under Japanese control wherever situated to surrender unconditionally themselves and all forces under their control.

We hereby command all civil, military and naval officials to obey and enforce all proclamations, orders and directives deemed by the Supreme Commander for the Allied Powers to be proper to effectuate this surrender and issued by him or under his authority and we direct all such officials to remain at their posts and to continue to perform their non-combatant duties unless specifically relieved by him or under his authority.

We hereby undertake for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever action may be required by the Supreme Commander for the Allied Powers or by any other designated representative of the Allied Powers for the purpose of giving effect to that Declaration.

We hereby command the Japanese Imperial Government and the Japanese Imperial General Headquarters at once to liberate all allied prisoners of war and civilian internees now under Japanese control and to provide for their protection, care, maintenance and immediate transportation to places as directed.

The authority of the Emperor and the Japanese Government to rule the State shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender.

Signed at TOKYO BAY, JAPAN at 0914 I
on the SECOND day of SEPTEMBER, 1945

重光葵

By Command and in behalf of the Emperor of Japan and the Japanese Government.

梅津美治郎

By Command and in behalf of the Japanese Imperial General Headquarters.

Accepted at TOKYO BAY, JAPAN at 0908 I
on the SECOND day of SEPTEMBER, 1945,
for the United States, Republic of China, United Kingdom and the Union of Soviet Socialist Republics, and in the interests of the other United Nations at war with Japan.

Douglas MacArthur
Supreme Commander for the Allied Powers.

C. W. Nimitz
United States Representative

徐永昌
Republic of China Representative

Bruce Fraser
United Kingdom Representative

Union of Soviet Socialist Republics Representative

[illegible]
Commonwealth of Australia Representative

[illegible]
Dominion of Canada Representative

[illegible]
Provisional Government of the French Republic Representative

[illegible]
Kingdom of the Netherlands Representative

Leonard M. Isitt
Dominion of New Zealand Representative

VII

Imperial Rescript Announcing Surrender to the Japanese People

(September 2, 1945 (Tokyo Time))

Accepting the terms set forth in Declaration issued by the heads of the Governments of the United States, Great Britain and China on July 26th, 1945 at Potsdam and subsequently adhered to by the Union of Soviet Socialist Republics, We have commanded the Japanese Imperial Government and the Japanese Imperial General Headquarters to sign on Our behalf the Instrument of Surrender presented by the Supreme Commander for the Allied Powers and to issue General Orders to the Military and Naval Forces in accordance with the direction of the Supreme Commander for the Allied Powers. We command all Our people forthwith to cease hostilities, to lay down their arms and faithfully to carry out all the provisions of Instrument of Surrender and the General Orders issued by the Japanese Imperial Government and the Japanese Imperial General Headquarters hereunder.

This second day of the ninth month of the twentieth year of Syōwa.

[Seal of the Emperor]

HIROHITO

NARUHIKO-Ō
Prime Minister
MAMORU SHIGEMITSU
Minister for Foreign Affairs
IWAO YAMAZAKI
Minister for Home Affairs
JUICHI TSUSHIMA
Minister of Finance
SADAMU SHIMOMURA
Minister of War
MITSUMASA YONAI
Minister of Navy
CHUZO IWATA
Minister of Justice
TAMON MAEDA
Minister of Education
KENZO MATSUMURA
Minister of Welfare
KOTARO SENGOKU
Minister of Agriculture and Forestry
CHIKUHEI NAKAJIMA
Minister of Commerce and Industry
NAOTO KOBIYAMA
Minister of Transportation
FUMIMARO KONOE
Minister without Portfolio
TAKETORA OGATA
Minister without Portfolio
BINSHIRO OBATA
Minister without Portfolio

VIII

Agreement of Foreign Ministers at Moscow on Establishing Far Eastern Commission and Allied Council for Japan

(December 27, 1945)

The Foreign Ministers of the Union of Soviet Socialist Republics, the United Kingdom, and the United States of America met in Moscow from December 16 to December 26, 1945, in accordance with the decision of the Crimea Conference, confirmed at the Berlin Conference, that there should be periodic consultation between them. At the meeting of the three Foreign Ministers, discussions took place on an informal and exploratory basis and agreement was reached on

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Far Eastern Commission and Allied Council for Japan

A. FAR EASTERN COMMISSION

Agreement was reached, with the concurrence of China, for the establishment of a Far Eastern Commission to take the place of the Far Eastern Advisory Commission. The Terms of Reference for the Far Eastern Commission are as follows:

I. Establishment of the Commission

A Far Eastern Commission is hereby established composed of the representatives of the Union of Soviet Socialist Republics, United Kingdom, United States, China, France, the Netherlands, Canada, Australia, New Zealand, India, and the Philippine Commonwealth.

II. Functions

A. The functions of the Far Eastern Commission shall be:

1. To formulate the policies, principles, and standards in conformity with which the fulfillment by Japan of its obligations under the Terms of Surrender may be accomplished.

2. To review, on the request of any member, any directive issued to the Supreme Commander for the Allied Powers or any action taken by the Supreme Commander involving policy decisions within the jurisdiction of the Commission.

3. To consider such other matters as may be assigned to it by agreement among the participating Governments reached in accordance with the voting procedure provided for in Article V–2 hereunder.

B. The Commission shall not make recommendations with regard to the conduct of military

operations nor with regard to territorial adjustments.

C. The Commission in its activities will proceed from the fact that there has been formed an Allied Council for Japan and will respect existing control machinery in Japan, including the chain of command from the United States Government to the Supreme Commander and the Supreme Commander's command of occupation forces.

III. Functions of the United States Government

1. The United States Government shall prepare directives in accordance with policy decisions of the Commission and shall transmit them to the Supreme Commander through the appropriate United States Government agency. The Supreme Commander shall be charged with the implementation of the directives which express the policy decisions of the Commission.

2. If the Commission decides that any directive or action reviewed in accordance with Article II–A–2 should be modified, its decision shall be regarded as a policy decision.

3. The United States Government may issue interim directives to the Supreme Commander pending action by the Commission whenever urgent matters arise not covered by policies already formulated by the Commission; provided that any directives dealing with fundamental changes in the Japanese constitutional structure or in the regime of control, or dealing with a change in the Japanese Government as a whole will be issued only following consultation and following the attainment of agreement in the Far Eastern Commission.

4. All directives issued shall be filed with the Commission.

IV. Other Methods of Consultation

The establishment of the Commission shall not preclude the use of other methods of consultation on Far Eastern issues by the participating Governments.

V. Composition

1. The Far Eastern Commission shall consist of one representative of each of the States party to this agreement. The membership of the Commission may be increased by agreement among the participating Powers as conditions warrant by the addition of representatives of other United Nations in the Far East or having territories therein. The Commission shall provide for full and adequate consultations, as occasion may require, with representatives of the United Nations not members of the Commission in regard to matters before the Commission which are of particular concern to such nations.

2. The Commission may take action by less than unanimous vote provided that action shall have the concurrence of at least a majority of all the representatives including the representatives of the four following Powers: United States, United Kingdom, Union of Soviet Socialist Republics and China.

VI. Location and Organization

1. The Far Eastern Commission shall have its headquarters in Washington. It may meet at other places as occasion requires, including Tokyo, if and when it deems it desirable to do so. It may make such arrangements through the Chair-

man as may be practicable for consultation with the Supreme Commander for the Allied Powers.

2. Each representative on the Commission may be accompanied by an appropriate staff comprising both civilian and military representation.

3. The Commission shall organize its secretariat, appoint such committees as may be deemed advisable, and otherwise perfect its organization and procedure.

VII. Termination

The Far Eastern Commission shall cease to function when a decision to that effect is taken by the concurrence of at least a majority of all the representatives including the representatives of the four following powers: United States, United Kingdom, Union of Soviet Socialist Republics and China. Prior to the termination of its functions the Commission shall transfer to any interim or permanent security organization of which the participating governments are members those functions which may appropriately be transferred.

It was agreed that the Government of the United States on behalf of the four Powers should present the Terms of Reference to the other Governments specified in Article I and invite them to participate in the Commission on the revised basis.

B. ALLIED COUNCIL FOR JAPAN

The following agreement was also reached, with the concurrence of China, for the establishment of an Allied Council for Japan:

1. There shall be established an Allied Council with its seat in Tokyo under the chairmanship

of the Supreme Commander for the Allied Powers (or his Deputy) for the purpose of consulting with and advising the Supreme Commander in regard to the implementation of the Terms of Surrender, the occupation and control of Japan, and of directives supplementary thereto; and for the purpose of exercising the control authority herein granted.

2. The membership of the Allied Council shall consist of the Supreme Commander (or his Deputy) who shall be Chairman and United States member; a Union of Soviet Socialist Republics member; a Chinese member; and a member representing jointly the United Kingdom, Australia, New Zealand, and India.

3. Each member shall be entitled to have an appropriate staff consisting of military and civilian advisers.

4. The Allied Council shall meet not less often than once every two weeks.

5. The Supreme Commander shall issue all orders for the implementation of the Terms of Surrender, the occupation and control of Japan, and directives supplementary thereto. In all cases action will be carried out under and through the Supreme Commander who is the sole executive authority for the Allied Powers in Japan. He will consult and advise with the Council in advance of the issuance of orders on matters of substance, the exigencies of the situation permitting. His decisions upon these matters shall be controlling.

6. If, regarding the implementation of policy decisions of the Far Eastern Commission on questions concerning a change in the regime of con-

trol, fundamental changes in the Japanese constitutional structure, and a change in the Japanese Government as a whole, a member of the Council disagrees with the Supreme Commander (or his Deputy), the Supreme Commander will withhold the issuance of orders on these questions pending agreement thereon in the Far Eastern Commission.

7. In cases of necessity the Supreme Commander may take decisions concerning the change of individual Ministers of the Japanese Government, or concerning the filling of vacancies created by the resignation of individual cabinet members, after appropriate preliminary consultation with the representatives of the other Allied Powers on the Allied Council.

* * * * *

IX

Establishment of an International Military Tribunal for the Far East

(SCAP Special Proclamation, January 19, 1946)

Whereas, the United States and the Nations allied therewith in opposing the illegal wars of aggression of the Axis Nations, have from time to time made declarations of their intentions that war criminals should be brought to justice;

Whereas, the Governments of the Allied Powers at war with Japan on the 26th July 1945 at Potsdam, declared as one of the terms of surrender that stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners;

WHEREAS, by the Instrument of Surrender of Japan executed at Tokyo Bay, Japan, on the 2nd September 1945, the signatories for Japan, by command of and in behalf of the Emperor and the Japanese Government, accepted the terms set forth in such Declaration at Potsdam;

WHEREAS, by such Instrument of Surrender, the authority of the Emperor and the Japanese Government to rule the state of Japan is made subject to the Supreme Commander for the Allied Powers, who is authorized to take such steps as he deems proper to effectuate the terms of surrender;

WHEREAS, the undersigned has been designated by the Allied Powers as Supreme Commander for the Allied Powers to carry into effect the general surrender of the Japanese armed forces;

WHEREAS, the Governments of the United States, Great Britain and Russia at the Moscow Conference, 26th December 1945, having considered the effectuation by Japan of the Terms of Surrender, with the concurrence of China have agreed that the Supreme Commander shall issue all Orders for the implementation of the Terms of Surrender.

NOW, THEREFORE, I, Douglas MacArthur, as Supreme Commander for the Allied Powers, by virtue of the authority so conferred upon me, in order to implement the Term of Surrender which requires the meting out of stern justice to war criminals, do order and provide as follows:

ARTICLE 1. There shall be established an International Military Tribunal for the Far East for the trial of those persons charged individually, or as members of organizations, or in both capac-

ities, with offenses which include crimes against peace.

ARTICLE 2. The Constitution, jurisdiction and functions of this Tribunal are those set forth in the Charter of the International Military Tribunal for the Far East, approved by me this day.

ARTICLE 3. Nothing in this Order shall prejudice the jurisdiction of any other international, national or occupation court, commission or other tribunal established or to be established in Japan or in any territory of a United Nation with which Japan has been at war, for the trial of war criminals.

Given under my hand at Tokyo, this 19th day of January, 1946.

DOUGLAS MACARTHUR,
General of the Army, United States Army,
Supreme Commander for the Allied Powers.

X

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

(as approved on January 19, 1946)

GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS

GENERAL ORDERS
NO. 1 — APO 500, *19 January 1946*

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

Proclamation of the Supreme Commander for the Allied Powers dated 19 January 1946 established an International Military Tribunal for the Far East. Charter of this Tribunal is as follows:

SECTION I

CONSTITUTION OF TRIBUNAL

ARTICLE 1. *Tribunal Established.* The International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo.

ARTICLE 2. *Members.* The Tribunal shall consist of not less than five nor more than nine Members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender.

ARTICLE 3. *Officers and Secretariat.*

a. President. The Supreme Commander for the Allied Powers shall appoint a Member to be President of the Tribunal.

b. Secretariat.

(1) The Secretariat of the Tribunal shall be composed of a General Secretary to be appointed by the Supreme Commander for the Allied Powers and such assistant secretaries, clerks, interpreters, and other personnel as may be necessary.

(2) The General Secretary shall organize and direct the work of the Secretariat.

(3) The Secretariat shall receive all documents addressed to the Tribunal, maintain the records of the Tribunal, provide necessary clerical services to the Tribunal and its Members, and perform such other duties as may be designated by the Tribunal.

ARTICLE 4. *Quorum and Voting.*

a. Quorum. The presence of a majority of all Members shall be necessary to constitute a quorum.

b. Voting. All decisions and judgments of this Tribunal, including convictions and sentences, shall be by a majority vote of those Members of the Tribunal present. In case the votes are evenly divided, the vote of the President shall be decisive.

SECTION II

JURISDICTION AND GENERAL PROVISIONS

ARTICLE 5. *Jurisdiction Over Persons and Offenses.* The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

a. Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

b. Conventional War Crimes: Namely, violations of the laws or customs of war;

c. Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any

civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

ARTICLE 6. *Responsibility of Accused.* Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

ARTICLE 7. *Rules of Procedure.* The Tribunal may draft and amend rules of procedure consistent with the fundamental provisions of this Charter.

ARTICLE 8. *Counsel.*

a. Chief of Counsel. The Chief of Counsel designated by the Supreme Commander for the Allied Powers is responsible for the investigation and prosecution of charges against war criminals within the jurisdiction of this Tribunal, and will render such legal assistance to the Supreme Commander as is appropriate.

b. Associate Counsel. Any United Nation with which Japan has been at war may appoint an Associate Counsel to assist the Chief of Counsel.

SECTION III

FAIR TRIAL FOR ACCUSED

ARTICLE 9. *Procedure for Fair Trial.* In order to insure fair trial for the accused, the following procedure shall be followed:

a. Indictment. The indictment shall consist of a plain, concise and adequate statement of each offense charged. Each accused shall be furnished in adequate time for defense a copy of the indictment, including any amendment, and of this Charter, in a language understood by the accused.

b. Hearing. During the trial or any preliminary proceedings the accused shall have the right to give any explanation relevant to the charges made against him.

c. Language. The trial and related proceedings shall be conducted in English and in the language of the accused. Translations of documents and other papers shall be provided as needed and requested.

d. Counsel for Accused. Each accused shall be represented by counsel of his own selection, subject to disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel or of counsel whom he desires the Tribunal to Appoint. If an accused is not represented by counsel, the Tribunal shall designate counsel for him.

e. Evidence for Defense. An accused shall have the right through himself or through his counsel to present evidence at the trial in support of his defense, and to examine any witness called by the prosecution, subject to such reasonable restrictions as the Tribunal may determine.

f. Production of Evidence for the Defense. An accused may apply in writing to the Tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located. It shall also state the facts proposed to be proved by the witness or the document and the relevancy of such facts to the defense. If the Tribunal grants the application, the Tribunal shall be given such aid in obtaining production of the evidence as the circumstances require.

ARTICLE 10. *Applications and Motions before Trial.* All motions, applications or other requests addressed to the Tribunal prior to the commencement of trial shall be made in writing and filed with the General Secretary of the Tribunal for action by the Tribunal.

SECTION IV

POWERS OF TRIBUNAL AND CONDUCT OF TRIAL

ARTICLE 11. *Powers.* The Tribunal shall have the power:

a. To summon witnesses to the trial, to require them to attend and testify, and to question them.

b. To interrogate each accused and to permit comment on his refusal to answer any question.

c. To require the production of documents and other evidentiary material.

d. To require of each witness an oath, affirmation, or such declaration as is customary in the country of the witness, and to administer oaths.

e. To appoint officers for the carrying out of any task designated by the Tribunal, including the power to have evidence taken on commission.

ARTICLE 12. *Conduct of Trial.* The Tribunal shall:

a. Confine the trial strictly to an expeditious hearing of the issues raised by the charges.

b. Take strict measures to prevent any action which would cause any unreasonable delay and rule out irrelevant issues and statements of any kind whatsoever.

c. Provide for the maintenance of order at the trial and deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any accused or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

d. Determine the mental and physical capacity of any accused to proceed to trial.

ARTICLE 13. ***Evidence.***

a. Admissibility. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible.

b. Relevance. The Tribunal may require to be informed of the nature of any evidence before it is offered in order to rule upon the relevance.

c. Specific evidence admissible. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

(1) A document, regardless of its security classification and without proof of its issuance or signature, which appears to the Tribunal to have been signed or is-

sued by any officer, department, agency or member of the armed forces of any government.

(2) A report which appears to the Tribunal to have been signed or issued by the International Red Cross or a member thereof, or by a doctor of medicine or any medical service personnel, or by an investigator or intelligence officer, or by any other person who appears to the Tribunal to have personal knowledge of the matters contained in the report.

(3) An affidavit, deposition or other signed statement.

(4) A diary, letter or other document, including sworn or unsworn statements, which appear to the Tribunal to contain information relating to the charge.

(5) A copy of a document or other secondary evidence of its contents, if the original is not immediately available.

d. Judicial Notice. The Tribunal shall not require proof of facts of common knowledge, nor of the authenticity of official government documents and reports of any nation or of the proceedings, records and findings of military or other agencies of any of the United Nations.

e. Records, Exhibits and Documents. The transcript of the proceedings, and exhibits and documents submitted to the Tribunal, will be filed with the General Secretary of the Tribunal and will constitute part of the Record.

ARTICLE 14. *Place of Trial.* The first trial will be held at Tokyo and any subsequent trials will be held at such places as the Tribunal decides.

ARTICLE 15. *Course of Trial Proceedings.* The proceedings at the Trial will take the following course:

a. The indictment will be read in court unless the reading is waived by all accused.

b. The Tribunal will ask each accused whether he pleads "guilty" or "not guilty".

c. The prosecution and each accused may make a concise opening statement.

d. The prosecution and defense may offer evidence and the admissibility of the same shall be determined by the Tribunal.

e. The prosecution and counsel for the accused may examine each witness and each accused who gives testimony.

f. Counsel for the accused may address the Tribunal.

g. The prosecution may address the Tribunal.

h. The Tribunal will deliver judgment and pronounce sentence.

SECTION V

JUDGMENT AND SENTENCE

ARTICLE 16. *Penalty.* The Tribunal shall have the power to impose upon an accused, on conviction, death or such other punishment as shall be determined by it to be just.

ARTICLE 17. *Judgment and Review.* The judgment will be announced in open court and will give the reasons on which it is based. The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action thereon. A sentence will be carried out in accordance with the Order of the Supreme

Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence except to increase its severity.

By command of General MACARTHUR:

RICHARD J. MARSHALL,
Major General, General Staff Corps,
Chief of Staff.

Official:
H W ALLEN
for
B. M. FITCH,
Brigadier General, AGD,
Adjutant General.

XI

Apprehension, Trial and Punishment of War Criminals in the Far East

(Far Eastern Commission Policy Decision, April 3, 1946)

1. The term "war crimes" as used herein, includes:

a. Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements and assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

b. Violations of the laws or customs of war. Such violations shall include but not be limited to murder, ill treatment or deportation to slave labor or for any other purpose of civilian population of, or in, occupied territory, murder or ill treatment of prisoners of war or persons on the seas, or elsewhere improper treatment of hostages, plunder of public or private property, wanton destruction of

cities, towns or villages or devastation not justified by military necessity.

c. Murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war or prosecutions on political, racial or religious grounds in execution of or in connection with any crime defined herein whether or not in violation of the domestic law of the country where perpetrated.

2. The offense need not have been committed after a particular date to render the responsible party or parties subject to arrest but, in general, should have been committed since, or in the period immediately preceding the Mukden incident of September 18, 1931. The preponderance of cases may be expected to relate to the years since the Lukouchiao incident of July 7, 1937.

3. All practicable measures should be taken to identify, investigate, apprehend, and detain all persons suspected of having committed war crimes, as defined in paragraph 1 above, and all persons whom any one of the United Nations or Italy charges with such crimes.

4. Suspected war criminals should be held in close confinement, without access to the press or other media of public information, and without distinction as to rank or position, as befits ordinary criminals.

5. The Supreme Commander for the Allied Powers should have:

(*a*) power to appoint special international military courts (which term should be held to include tribunals of any type) composed of military, naval, or air force officers or civilians represent-

ing any two or more of the states members of the Far Eastern Commission for the trial under any applicable law, domestic or international, including the laws and customs of war, of the Far Eastern war criminals indicted by the Governments of these states, and

(*b*) power to prescribe, subject to consultation with the representatives of those governments, rules of procedure for such courts. The Supreme Commander shall appoint to each international court a judge nominated by each state represented on the Far Eastern Commission which signifies its desire to participate in the work of such court. In the appointment of the international courts and in all trials before them, the international character of the courts and of the authority by which they were appointed and under which they act should be properly emphasized and recognized, particularly in dealings with the Japanese people. The Supreme Commander for the Allied Powers should have, (1) the responsibility for carrying out the judgments of any international courts appointed by him, and (2) the power to approve, reduce or otherwise alter any sentences imposed by any such courts, but not to increase the severity thereof, after consultation with the Allied Council for Japan and the Representatives in Japan of the other Powers, members of the Far Eastern Commission.

6. The Supreme Commander for the Allied Powers (*a*) should promptly establish an agency, acting under his Command to investigate reports of war crimes, to collect and analyze evidence, to arrange for the apprehension and prompt trial of suspects, to prepare, supervise and conduct the

prosecution of individuals and organizations before international military courts or tribunals, and to recommend to the Supreme Commander which individuals and organizations should be prosecuted, before what courts they should be tried and what persons should be secured as witnesses, and (*b*) should provide, after discussion with the local representatives of the nations involved, and in a manner consistent with efficient administration, for equitable inclusion in the membership of such agency of suitable representatives of the States members of the Far Eastern Commission. This agency should advise the Supreme Commander and other Military commanders for the Allies on matters relating to war criminals. This agency should attach importance to the investigation of the evidence that offenses of the type described in paragraph 1*a* above have been committed, should collect and analyze the evidence of such offenses and should recommend to the Supreme Commander a plan as indicated in paragraph 5 above for the appointment of an international court for the trial of such offenses and the charges to be preferred. This agency should also maintain a central record and information office of Japanese war criminals and war crimes, the records and files of which should be available to any interested United Nation.

7. The military command of any nation (including the United States) participating in the occupation of areas previously dominated by Japan may establish special national military courts to deal with war criminals not held or requested by the Supreme Commander for trial by an international military court or tribunal of

the types referred to in paragraph 6 above. Such courts should be separate from courts which may be set up to deal with current offenses against the occupation or infractions of military discipline.

8. Military commanders of forces of occupation in the Far East should promptly comply with a request by the government of any one of the United Nations or Italy for the delivery to it of any person who is stated in such request to be charged with a war crime, subject to the following exceptions:

(1) Persons who have held high political, civil or military positions in the Japanese Empire or in one of its allies, co-belligerents or satellites, should not be delivered, pending decision whether such person should be tried before an international military court or tribunal. Suspected war criminals desired for trial before such a court or tribunal or persons desired as witnesses at such trials will not be turned over to the nation requesting them so long as their presence is desired in connection with such trials.

(2) Where persons are requested by more than one of the Governments above-mentioned for trial of a war crime, the military commanders concerned should make their determinations based on all circumstances, including the relative seriousness of the respective charges against such a person and the national interests involved, and should deliver the requested person to a particular United Nation or Italy accordingly.

9. Compliance with any request for the delivery of a suspected war criminal should not be delayed on the ground that other requests for the same person are anticipated.

10. Delivery of a suspected war criminal to a requesting government should be subject to the condition that if such person is not brought to trial, tried and convicted within six months from the date he is so delivered, he will be returned to the authority who made delivery if he has been requested for trial by any of the other United Nations or Italy.

11. Military commanders should take under their control, pending subsequent decisions as to its eventual disposition, property, real and personal, found in areas of their respective jurisdiction and owned or controlled by persons taken into custody pursuant to the provisions of paragraph 3 above.

12. Such measures as are deemed necessary should be taken to insure that witnesses to war crimes will be available when required.

13. The execution of death sentences should be deferred if there is reason to believe that the testimony of those convicted would be of value in the trial of other war criminals.

14. Any national of any United Nation who may be requested, or who there is reason to believe may be desired, by his government as a renegade or quisling, should be arrested. Such person should normally be turned over as soon as practicable to their government.

15. Military commanders having custody of alleged offenders requested under paragraphs 8 and 14 above, if in doubt as to whether such persons should be turned over to the demanding nation for trial, should consult their government and, in appropriate cases, leave the matter to be dealt with through diplomatic channels.

Within the main islands of Japan, the Supreme Commander for the Allied Powers will have custody of such alleged offenders and should consult the Joint Chiefs of Staff in cases of doubt.

XII

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

(As approved on April 26, 1946)

GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS

GENERAL ORDERS
No. 20

APO 500
26 April 1946

General Orders No. 1, General Headquarters, Supreme Commander for the Allied Powers, 19 January 1946, subject as below, is superseded. The Charter of the International Military Tribunal for the Far East established by Proclamation of the Supreme Commander for the Allied Powers, 19 January 1946, is amended, and as amended, reads as follows:

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

SECTION I

CONSTITUTION OF TRIBUNAL

ARTICLE 1. *Tribunal Established.* The International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo.

ARTICLE 2. *Members.* The Tribunal shall consist of not less than six members nor more than

eleven members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines.

ARTICLE 3. *Officers and Secretariat.*

a. President. The Supreme Commander for the Allied Powers shall appoint a Member to be President of the Tribunal.

b. Secretariat.

(1) The Secretariat of the Tribunal shall be composed of a General Secretary to be appointed by the Supreme Commander for the Allied Powers and such assistant secretaries, clerks, interpreters, and other personnel as may be necessary.

(2) The General Secretary shall organize and direct the work of the Secretariat.

(3) The Secretariat shall receive all documents addressed to the Tribunal, maintain the records of the Tribunal, provide necessary clerical services to the Tribunal and its members, and perform such other duties as may be designated by the Tribunal.

ARTICLE 4. *Convening and Quorum, Voting, and Absence.*

a. Convening and Quorum. When as many as six members of the Tribunal are present, they may convene the Tribunal in formal session. The presence of a majority of all members shall be necessary to constitute a quorum.

b. Voting. All decisions and judgments of this Tribunal, including convictions and sentences, shall be by a majority vote of those members of

the Tribunal present. In case the votes are evenly divided, the vote of the President shall be decisive.

c. Absence. If a member at any time is absent and afterwards is able to be present, he shall take part in all subsequent proceedings, unless he declares in open court that he is disqualified by reason of insufficient familiarity with the proceedings which took place in his absence.

SECTION II

JURISDICTION AND GENERAL PROVISIONS

ARTICLE 5. *Jurisdiction Over Persons and Offenses.* The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

a. Crimes against Peace. Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

b. Conventional War Crimes. Namely, violations of the laws or customs of war;

c. Crimes against Humanity. Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial

grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

ARTICLE 6. *Responsibility of Accused.* Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

ARTICLE 7. *Rules of Procedure.* The Tribunal may draft and amend rules of procedure consistent with the fundamental provisions of this Charter.

ARTICLE 8. *Counsel.*

a. Chief of Counsel. The Chief of Counsel designated by the Supreme Commander for the Allied Powers is responsible for the investigation and prosecution of charges against war criminals within the jurisdiction of this Tribunal and will render such legal assistance to the Supreme Commander as is appropriate.

b. Associate Counsel. Any United Nation with which Japan has been at war may appoint an Associate Counsel to assist the Chief of Counsel:

SECTION III

FAIR TRIAL FOR ACCUSED

ARTICLE 9. *Procedure for Fair Trial.* In order to insure fair trial for the accused the following procedure shall be followed:

a. Indictment. The indictment shall consist of a plain, concise, and adequate statement of each offense charged. Each accused shall be furnished, in adequate time for defense, a copy of the indictment, including any amendment, and of this Charter, in a language understood by the accused.

b. Language. The trial and related proceedings shall be conducted in English and in the language of the accused. Translations of documents and other papers shall be provided as needed and requested.

c. Counsel for Accused. Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial.

d. Evidence for Defense. An accused shall have the right, through himself or through his counsel (but not through both), to conduct his defense, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine.

e. Production of Evidence for the Defense. An accused may apply in writing to the Tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located. It shall also state the facts proposed to be proved by the witness or the document and the relevancy of such facts to the defense. If the Tribunal grants the application the Tribunal shall be given such aid in obtaining production of the evidence as the circumstances require.

ARTICLE 10. *Applications and Motions before Trial.* All motions, applications, or other requests addressed to the Tribunal prior to the commencement of trial shall be made in writing and filed with the General Secretary of the Tribunal for action by the Tribunal.

SECTION IV

POWERS OF TRIBUNAL AND CONDUCT OF TRIAL

ARTICLE 11. *Powers.* The Tribunal shall have the power:

a. To summon witnesses to the trial, to require them to attend and testify, and to question them.

b. To interrogate each accused and to permit comment on his refusal to answer any question.

c. To require the production of documents and other evidentiary material.

d. To require of each witness an oath, affirmation, or such declaration as is customary in the country of the witness, and to administer oaths.

e. To appoint officers for the carrying out of any task designated by the Tribunal, including the power to have evidence taken on commission.

ARTICLE 12. *Conduct of Trial.* The Tribunal shall:

a. Confine the trial strictly to an expeditious hearing of the issues raised by the charges.

b. Take strict measures to prevent any action which would cause any unreasonable delay and rule out irrelevant issues and statements of any kind whatsoever.

c. Provide for the maintenance of order at the trial and deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any accused or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

d. Determine the mental and physical capacity of any accused to proceed to trial.

ARTICLE 13. *Evidence.*

a. Admissibility. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible.

b. Relevance. The Tribunal may require to be informed of the nature of any evidence before it is offered in order to rule upon the relevance.

c. Specific evidence admissible. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

(1) A document, regardless of its security classification and without proof of its issuance or signature, which appears to the Tribunal to have been signed or is-

sued by any officer, department, agency or member of the armed forces of any government.

(2) A report which appears to the Tribunal to have been signed or issued by the International Red Cross or a member thereof, or by a doctor of medicine or any medical service personnel, or by an investigator or intelligence officer, or by any other person who appears to the Tribunal to have personal knowledge of the matters contained in the report.

(3) An affidavit, deposition or other signed statement.

(4) A diary, letter or other document, including sworn or unsworn statements, which appear to the Tribunal to contain information relating to the charge.

(5) A copy of a document or other secondary evidence of its contents, if the original is not immediately available.

d. Judicial Notice. The Tribunal shall neither require proof of facts of common knowledge, nor of the authenticity of official government documents and reports of any nation or of the proceedings, records, and findings of military or other agencies of any of the United Nations.

e. Records, Exhibits, and Documents. The transcript of the proceedings, and exhibits and documents submitted to the Tribunal, will be filed with the General Secretary of the Tribunal and will constitute part of the Record.

ARTICLE 14. *Place of Trial.* The first trial will be held at Tokyo, and any subsequent trials will be held at such places as the Tribunal decides.

ARTICLE 15. *Course of Trial Proceedings.* The proceedings at the Trial will take the following course:

a. The indictment will be read in court unless the reading is waived by all accused.

b. The Tribunal will ask each accused whether he pleads "guilty" or "not guilty".

c. The prosecution and each accused (by counsel only, if represented) may make a concise opening statement.

d. The prosecution and defense may offer evidence, and the admissibility of the same shall be determined by the Tribunal.

e. The prosecution and each accused (by counsel only, if represented) may examine each witness and each accused who gives testimony.

f. Accused (by counsel only, if represented) may address the Tribunal.

g. The prosecution may address the Tribunal.

h. The Tribunal will deliver judgment and pronounce sentence.

SECTION V

JUDGEMENT AND SENTENCE

ARTICLE 16. *Penalty.* The Tribunal shall have the power to impose upon an accused, on conviction, death, or such other punishment as shall be determined by it to be just.

ARTICLE 17. *Judgment and review.* The judgment will be announced in open court and will give the reasons on which it is based. The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action. Sentence will be carried out in accordance with the Order of the Supreme Commander

for the Allied Powers, who may at any time reduce or otherwise alter the sentence, except to increase its severity.

By command of General MacArthur:

RICHARD J. MARSHALL,
Major General, General Staff Corps,
Chief of Staff.

OFFICIAL:

B. M. FITCH,
Brigadier General, AGD,
Adjutant General.

XIII

APPOINTMENT OF MEMBERS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS

GENERAL ORDERS
No. 7

APO 500
15 February 1946

APPOINTMENT OF MEMBERS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

1. In order to implement the Instrument of Surrender of Japan executed at Tokyo Bay, Japan, on 2 September 1945, and Paragraph 10 of the Potsdam Agreement of 26 July 1945, and in furtherance of Article 2 of the Charter of the International Military Tribunal for the Far East, the following nominees of their respective countries are hereby appointed as members of the International Military Tribunal for the Far East for the trial of such persons as may be properly brought before it:

The Honorable Sir William Flood Webb (Commonwealth of Australia)

The Honorable Mr. Justice E. Stuart McDougall (Dominion of Canada)

The Honorable Ju-Ao Mei (Republic of China)

The Honorable Mr. Henri Reimburger (Republic of France)

Professor Bernard Victor A. Roling (Kingdom of the Netherlands)

The Honorable Mr. Justice Erima Harvey Northcroft (Dominion of New Zealand)

The Honorable Mr. Justice I. M. Zaryanov (Union of Soviet Socialist Republics)

The Honorable Lord Patrick (United Kingdom)

The Honorable Mr. Justice John P. Higgins (United States of America)

2. The Honorable Sir William Flood Webb is designated as President of the International Military Tribunal for the Far East.

3. The Charter of the International Military Tribunal for the Far East (Article 1) provides that the permanent seat of the Tribunal is in Tokyo.

4. The responsibilities, powers and duties of the members of the Tribunal are set forth in the Charter thereof, published as General Orders No. 1 of this Headquarters, 19 January 1946.

By command of General MacArthur:

Richard J. Marshall,
Major General, General Staff Corps,
Chief of Staff.

Official:

s/ B. M. Fitch,
t/ B. M. Fitch,
Brigadier General, AGD,
Adjutant General.

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GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS

GENERAL ORDERS
No. 15

APO 500
5 April 1946.

APPOINTMENT OF MEMBERS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

1. By authority contained in paragraph 1, General Orders No. 7, General Headquarters, Supreme Commander for the Allied Powers, APO 500, 15 February 1946, the Honorable Henri Bernard (Republic of France) is appointed member of the International Military Tribunal for the Far East, vice The Honorable Henri Reimburger, (Republic of France) resigned.

2. So much of paragraph 1, General Orders No. 7, General Headquarters, Supreme Commander for the Allied Powers, APO 500, 15 February 1946, as reads "Professor Bernard Victor A. Roling (Kingdom of the Netherlands)" is changed to read "The Honorable Bernard Victor A. Roling (Kingdom of the Netherlands)".

By command of General MACARTHUR:

RICHARD J. MARSHALL,
Major General, General Staff Corps,
Chief of Staff.

OFFICIAL:

s/ B. M. FITCH,
t/ B. M. Fitch,
Brigadier General, ACD,
Adjutant General.

XIV

INDICTMENT[1]

INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

No. 1

THE UNITED STATES OF AMERICA, THE REPUBLIC OF CHINA, THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, THE UNION OF SOVIET SOCIALIST REPUBLICS, THE COMMONWEALTH OF AUSTRALIA, CANADA, THE REPUBLIC OF FRANCE, THE KINGDOM OF THE NETHERLANDS, NEW ZEALAND, INDIA, AND THE COMMONWEALTH OF THE PHILIPPINES.

AGAINST

ARAKI, Sadao; DOHIHARA, Kenji; HASHIMOTO, Kingoro; HATA, Shunroku; HIRANUMA, Kiichiro; HIROTA, Koki; HOSHINO, Naoki; ITAGAKI, Seishiro; KAYA, Okinori; KIDO, Koichi; KIMURA, Heitaro; KOISO, Kuniaki; MATSUI, Iwane; MATSUOKA, Yosuke; MINAMI, Jiro; MUTO, Akira; NAGANO, Osami; OKA, Takasumi; OKAWA, Shumei; OSHIMA, Hiroshi; SATO,

[1] The appendixes to the indictment are omitted. They are:

Appendix A: Summarized Particulars Showing the Principal Matters and Events Upon Which the Prosecution Will Rely in Support of the Several Counts of the Indictment in Group One.

Appendix B: List of Articles of Treaties Violated by Japan and Incorporated in Groups One and Two.

Appendix C: List of Official Assurances Violated by Japan and Incorporated in Group One.

Appendix D: Incorporated in Group Three.

Appendix E: Statement of Individual Responsibility for Crimes Set Out in the Indictment.

Kenryo; SHIGEMITSU, Mamoru; SHIMADA, Shigetaro; SHIRATORI, Toshio; SUZUKI, Teiichi; TOGO, Shigenori; TOJO, Hideki; UMEZU, Yoshijiro. Accused.

In the years hereinafter referred to in this Indictment the internal and foreign policies of Japan were dominated and directed by a criminal, militaristic clique, and such policies were the cause of serious world troubles, aggressive wars, and great damage to the interests of peace-loving peoples, as well as to the interests of the Japanese people themselves.

The mind of the Japanese people was systematically poisoned with harmful ideas of the alleged racial superiority of the Japanese over other peoples of Asia and even of the whole world. Such parliamentary institutions as existed in Japan were used as implements for widespread aggression, and a system similar to those then established by Hitler and the Nazi party in Germany and by the Fascist party in Italy was introduced. The economic and financial resources of Japan were to a large extent mobilized for war aims, to the detriment of the welfare of the Japanese people.

A conspiracy among the accused, joined in by the rulers of other aggressive countries, namely, Nazi Germany and Fascist Italy, was entered into. The main objects of this conspiracy was to secure the domination and exploitation by the aggressive States of the rest of the world, and to this end to commit, or encourage the commission of crimes against peace, war crimes, and crimes against humanity as defined in the Charter of this Tribunal, thus threatening and injuring the basic

principles of liberty and respect for the human personality.

In the promotion and accomplishment of that scheme, these accused, taking advantage of their power and their official positions and their own personal prestige and influence, intended to and did plan, prepare, initiate, or wage aggressive war against the United States of America, the Republic of China, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, the Commonwealth of Australia, Canada, the Republic of France, the Kingdom of the Netherlands, New Zealand, India, the Commonwealth of the Philippines, and other peaceful nations, in violation of international law, as well as in violation of sacred treaty commitments, obligations and assurances. In furtherance of such scheme the accused contemplated and carried out the violation of recognized customs and conventions of war by murdering, maiming and ill-treating prisoners of war, civilian internees, and persons on the high seas, denying them adquate food, shelter, clothing, medical care, or other appropriate attention, forcing them to labour under inhumane conditions, and subjecting them to indignities; the exploitation to Japan's benefit of the manpower and economic resources of the vanquished nations; the plundering of public and private property; the wanton destruction of cities, towns and villages beyond any justification of military necessity; the perpetration of mass murder, rape, pillage, brigandage, torture, and other barbaric cruelties upon the helpless civilian population of the over-run countries; the increase of the in-

fluence and control of the military and naval groups over Japanese government officials and agencies; the psychological preparation of Japanese public opinion for aggressive warfare by establishing so-called Assistance Societies, by teaching nationalistic policies of expansion, by disseminating war propaganda, and by exercising strict control over the press and radio; the setting up of "puppet" governments in conquered countries; and the conclusion of military alliances with Germany and Italy to enhance by military might Japan's programme of expansion.

Therefore, the above named Nations by their undersigned representatives, duly appointed to represent their respective Governments in the investigation of the charges against and the prosecution of the Major War Criminals, pursuant to the Potsdam Declaration of the 20th July, 1945, and the Instrument of Surrender of the 2nd September, 1945, and the Charter of the Tribunal, promulgated by the Supreme Commander for the Allied Powers on 19th January, 1946 and amended 26th April, 1946, hereby accuse as guilty, in the respects hereinafter set forth, of Crimes against Peace, War Crimes, and Crimes against Humanity, and of Common Plans or Conspiracies to commit those Crimes, all as defined in the Charter of the Tribunal, and accordingly name as the accused in this cause and as indicted on the Counts hereinafter set out in which their names respectively appear, all the above-named individuals.

GROUP ONE: CRIMES AGAINST PEACE

The following counts charge Crimes against Peace, being acts for which it is charged that each of the persons named are individually responsible in accordance with Article 5 and particularly Article 5 (a) of the Charter of the International Military Tribunal for the Far East, and in accordance with International Law.

Count 1

All the accused together with other persons, between the 1st January, 1928, and the 2nd September, 1945, participated as leaders, organisers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy, and are responsible for all acts performed by any person in execution of such plan.

The object of such plan or conspiracy was that Japan should secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and of all countries bordering thereon and islands therein, and for that purpose they conspired that Japan should alone or in combination with other countries having similar objects, or who could be induced or coerced to join therein, wage declared or undeclared war or wars of aggression, and war or wars in violation of international law, treaties, agreements and assurances, against any country or countries which might oppose that purpose.

The whole of the Particulars in Appendix A, of the Treaty Articles in Appendix B, and of the Assurances in Appendix C, relate to this Count.

Count 2

All the accused together with other persons, between the 1st January, 1928, and the 2nd September, 1945, participated as leaders, organisers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy and are responsible for all acts performed by any person in execution of such plan.

The object of such plan or conspiracy was that Japan should secure the military, naval, political and economic domination of the provinces of Liaoning, Kirin, Heilungkiang, and Jehol, being parts of the Republic of China, either directly or by establishing a separate state under the control of Japan, and for that purpose they conspired that Japan should wage declared or undeclared war or wars of aggression, and war or wars in violation of international law, treaties, agreements and assurances, against the Republic of China.

The whole of the Particulars in Appendix A; the following Treaty Articles in Appendix B: Nos. 1 to 6 inclusive, 8 to 14 inclusive, 22 to 30 inclusive, 32 to 35 inclusive; and the following Assurances in appendix C: Nos. 1 to 8 inclusive, relate to this Count.

Count 3

All the accused together with other persons, between the 1st January, 1928, and the 2nd September, 1945, participated as leaders, organisers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy, and are responsible for all acts performed by any person in execution of such plan.

The object of such plan or conspiracy was that Japan should secure the miltary, naval, political and economic domination of the Republic of China, either directly or by establishing a separate state or states under the control of Japan, and for that purpose they conspired that Japan should wage declared or undeclared war or wars of aggression, and war or wars in violation of international law, treaties, agreements and assurances, against the Republic of China.

The whole of the Particulars in Appendix A, and the same Treaty Articles and Assurances as in Count 2, relate to this Count.

Count 4

All the accused together with other persons, between the 1st January, 1928, and the 2nd September, 1945, participated as leaders, organisers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy, and are responsible for all acts performed by any person in execution of such plan.

The object of such plan or conspiracy was that Japan should secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and of all countries bordering thereon and islands therein, and for that purpose they conspired that Japan should alone or in combination with other countries having similar objects, or who could be induced or coerced to join therein, wage declared or undeclared war or wars of aggression, and war or wars in violation of international law, treaties, agreements and assurances, against the United States of America, the British Commonwealth of Nations

(which expression wherever used in this Indictment includes the United Kingdom of Great Britain and Northern Ireland, the Commonwealth of Australia, Canada, New Zealand, South Africa, India, Burma, the Malay States, and all other parts of the British Empire not separately represented in the League of Nations), the Republic of France, the Kingdom of the Netherlands, the Republic of China, the Republic of Portugal, the Kingdom of Thailand (Siam), the Commonwealth of the Philippines, and the Union of Soviet Socialist Republics, or such of them as might oppose that purpose.

The whole of the Particulars in Appendix A, of the Treaty Articles in Appendix B, and of the Assurances in Appendix C, relate to this Count.

Count 5

All the accused together with other persons, between the 1st January, 1928, and the 2nd September, 1945, participated as leaders, organisers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy, and are responsible for all acts performed by any person in execution of such plan.

The object of such plan or conspiracy was that Germany, Italy and Japan should secure the military, naval, political and economic domination of the whole world, each having special domination in its own sphere, the sphere of Japan covering East Asia, the Pacific and Indian Oceans and all countries bordering thereon and islands therein, and for that purpose they conspired that Germany, Italy, and Japan should mutually assist one another to wage declared or

undeclared war or wars of aggression, and war or wars in violation of international law, treaties, agreements and assurances, against any countries which might oppose that purpose, and particularly against the United States of America, the British Commonwealth of Nations, the Republic of France, the Kingdom of the Netherlands, the Republic of China, the Republic of Portugal, the Kingdom of Thailand (Siam), the Commonwealth of the Philippines, and the Union of Soviet Socialist Republics.

The whole of the Particulars in Appendix A, of the Treaty Articles in Appendix B, and of the Assurances in Appendix C, relate to this Count.

Count 6

All the accused, between the 1st January, 1928, and the 2nd September, 1945, planned and prepared a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Republic of China.

The following Sections of the Particulars in Appendix A: Nos. 1 to 6 inclusive, and the same Treaty Articles and Assurances as in Count 2, relate to this Count.

Count 7

All the accused, between the 1st January, 1928, and the 2nd September, 1945, planned and prepared a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the United States of America.

The following Sections of the Particulars in Appendix A: Nos. 3, 4, 5, 6, 7, 9, and 10; the following Treaty Articles in Appendix B: Nos. 1 to 10 inclusive, 17 to 19 inclusive, 22 to 35, inclusive and 37; and the whole of the Assurances in Appendix C, relate to this Count.

Count 8

All the accused, between the 1st January, 1928, and the 2nd September, 1945, planned and prepared a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the United Kingdom of Great Britain and Northern Ireland and all parts of the British Commonwealth of Nations not the subject of separate counts in this Indictment.

The following Sections of the Particulars in Appendix A: Nos. 3, 4, 5, 6, 7, 9, and 10; the following Treaty Articles in Appendix B: Nos. 1, 2, 5, 10 to 19 inclusive, 22 to 30 inclusive, 32 to 35 inclusive, 37 and 38; and the whole of the Assurances in Appendix C, relate to this Count.

Count 9

All the accused, between the 1st January, 1928, and the 2nd September, 1945, planned and prepared a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Commonwealth of Australia.

The same Sections of the Particulars in Appendix A, and the same Treaty Articles and Assurances as in Count 8, relate to this Count.

Count 10

All the accused, between the 1st January, 1928, and the 2nd September, 1945, planned and prepared a war of aggression and a war in violation of international law, treaties, agreements and assurances against New Zealand.

The same Sections of the Particulars in Appendix A, and the same Treaty Articles and Assurances as in Count 8, relate to this Count.

Count 11

All the accused, between the 1st January, 1928, and the 2nd September, 1945, planned and prepared a war of aggression and a war in violation of international law, treaties, agreements and assurances, against Canada.

The same Sections of the Particulars in Appendix A, and the same Treaty Articles and Assurances as in Count 8, relate to this Count.

Count 12

All the accused, between the 1st January, 1928, and the 2nd September, 1945, planned and prepared a war of aggression and a war in violation of international law, treaties, agreements and assurances, against India.

The same Sections of the Particulars in Appendix A, and the same Treaty Articles and Assurances as in Count 8, relate to this Count.

Count 13

All the accused, between the 1st January, 1928, and the 2nd September, 1945, planned and prepared a war of aggression and a war in violation

of international law, treaties, agreements and assurances, against the Commonwealth of the Philippines.

The same Sections of the Particulars in Appendix A, and the same Treaty Articles and Assurances as in Count 7, relate to this Count.

Count 14

All the accused, between the 1st January, 1928, and the 2nd September, 1945, planned and prepared a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Kingdom of the Netherlands.

The following Sections of the Particulars in Appendix A: Nos. 3, 4, 5, 6, 7, 9, and 10; the following Treaty Articles in Appendix B: Nos. 1 to 5 inclusive, 10 to 18 inclusive, 20, 22 to 30 inclusive, 32 to 35 inclusive, 37 and 38; and the following Assurances in Appendix C: Nos. 10 to 15 inclusive, relate to this Count.

Count 15

All the accused, between the 1st January, 1928, and the 2nd September, 1945, planned and prepared a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Republic of France.

The following Sections of the Particulars in Appendix A: Nos. 2, 3, 4, 5, 6, 7, 9, and 10; the following Treaty Articles in Appendix B: Nos. 1 to 5 inclusive, 10 to 19 inclusive, 22 to 30 inclusive, and 32 to 38 inclusive; and the following Assurances in Appendix C: Nos. 14 and 15, relate to this Count.

Count 16

All the accused, between the 1st January, 1928, and the 2nd September, 1945, planned and prepared a war of aggression and a war in violation of international law, treaties, agreements and assurances against the Kingdom of Thailand.

The following Sections of the Particulars in Appendix A: Nos. 2, 3, 4, 5, 6, 7, 9, and 10; and the following Treaty Articles in Appendix B: Nos. 3, 4, 5, 10 and 32 to 38 inclusive, relate to this Count.

Count 17

All the accused, between the 1st January, 1928, and the 2nd September, 1945, planned and prepared a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Union of Soviet Socialist Republics.

The following Sections of the Particulars in Appendix A: Nos. 1 to 8 inclusive; the following Treaty Articles in Appendix B: Nos. 1 to 5 inclusive, 10 to 18 inclusive, 32 to 35 inclusive, 39 to 47 inclusive, and Assurance No. 13 in Appendix C, relate to this Count.

Count 18

The accused ARAKI, DOHIHARA, HASHIMOTO, HIRANUMA, ITAGAKI, KOISO, MINAMI, OKAWA, SHIGEMITSU, TOJO and UMEZU, on or about the 18th September, 1931, initiated a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Republic of China.

Section 1 of the Particulars in Appendix A; and the following Treaty Articles in Appendix B: Nos. 1 to 5 inclusive, 11 to 14 inclusive, 22, 23, 25, 30, 40 to 43 inclusive, relate to this Count.

Count 19

The accused ARAKI, DOHIHARA, HASHIMOTO, HATA, HIRANUMA, HIROTA, HOSHINO, ITAGAKI, KAYA, KIDO, MATSUI, MUTO, SUZUKI, TOJO and UMEZU, on or about the 7th July, 1937, initiated a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Republic of China.

Section 2 of the Particulars in Appendix A; the same Treaty Articles as in Count 18, and the following Assurances in Appendix C; Nos. 3, 4 and 5, relate to this Count.

Count 20

The accused DOHIHARA, HIRANUMA, HIROTA, HOSHINO, KAYA, KIDO, KIMURA, MUTO, NAGANO, OKA, OSHIMA, SATO, SHIMADA, SUZUKI, TOGO and TOJO, on or about the 7th December, 1941, initiated a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the United States of America.

Section 9 of the Particulars in Appendix A; the following Treaty Articles in Appendix B: Nos. 1 to 9 inclusive, 19, 22 to 30 inclusive, 33, 34 and 37; and the whole of the Assurances in Appendix C, relate to this Count.

Count 21

The same accused as in Count 20, on or about the 7th December, 1941, initiated a war of aggres-

sion and a war in violation of international law, treaties, agreements and assurances, against the Commonwealth of the Philippines.

The same Particulars, Treaty Articles and Assurances as in Count 20, relate to this Count.

Count 22

The same accused as in Count 20, on or about the 7th December, 1941, initiated a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the British Commonwealth of Nations.

Section 9 of the Particulars in Appendix A; the following Treaty Articles in Appendix B: Nos. 1 to 5 inclusive, 19, 22 to 30 inclusive, 33 and 37; and the whole of the Assurances in Appendix C, relate to this Count.

Count 23

The accused ARAKI, DOHIHARA, HIRANUMA, HIROTA, HOSHINO, ITAGAKI, KIDO, MATSUOKA, MUTO NAGANO, SHIGEMITSU and TOJO, on or about the 22nd September, 1940, initiated a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Republic of France.

The same particulars, Treaty Articles and Assurances as in Count 15, relate to this Count.

Count 24

The same accused as in Count 20, on or about the 7th December, 1941, initiated a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Kingdom of Thailand.

Section 7 of the Particulars in Appendix A, and following Treaty Articles in Appendix B: Nos. 1 to 5 inclusive, 33, 34, 36, 37 and 38, relate to this Count.

Count 25

The accused ARAKI, DOHIHARA, HATA, HIRANUMA, HIROTA, HOSHINO, ITAGAKI, KIDO, MATSUOKA, MATSUI, SHIGEMITSU, SUZUKI and TOJO, during July and August, 1938, initiated a war of aggression and a war in violation of international law, treaties, agreements and assurances, by attacking the Union of Soviet Socialist Republics in the area of Lake Khasan.

The same Particulars, Treaty Articles and Assurances as in Count 17, relate to this Count.

Count 26

The accused ARAKI, DOHIHARA, HATA, HIRANUMA, ITAGAKI, KIDO, KOISO, MATSUI, MATSUOKA, MUTO, SUZUKI, TOGO, TOJO and UMEZU, during the summer of 1939, initiated a war of aggression and a war in violation of international law, treaties, agreements and assurances, by attacking the territory of the Mongolian People's Republic in the area of the Khackhin-Gol River.

The same Particulars, Treaty Articles and Assurances as in Count 17, relate to this Count.

Count 27

All the accused, between the 18th September, 1931, and the 2nd September, 1945, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Republic of China.

The same Particulars, Treaty Articles and Assurances as in Count 2, relate to this Count.

Count 28

All the accused, between the 7th July, 1937, and the 2nd September, 1945, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Republic of China.

The same Particulars, Treaty Articles and Assurances as in Count 2, relate to this Count.

Count 29

All the accused, between the 7th December, 1941, and the 2nd September, 1945, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the United States of America.

The following Sections of the Particulars in Appendix A: Nos. 4 to 10 inclusive; and the same Treaty Articles and Assurances as in Count 20, relate to this Count.

Count 30

All the accused, between the 7th December, 1941, and the 2nd September, 1945, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Commonwealth of the Philippines.

The same Particulars, Treaty Articles and Assurances as in Count 29, relate to this Count.

Count 31

All the accused, between the 7th December, 1941, and the 2nd September, 1945, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the British Commonwealth of Nations.

The following Sections of the Particulars in Appendix A: Nos. 4 to 10 inclusive; and the same Treaty Articles and Assurances as in Count 22, relate to this Count.

Count 32

All the accused, between the 7th December, 1941, and the 2nd September, 1945, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Kingdom of the Netherlands.

The same Particulars, Treaty Articles and Assurances as in Count 14, relate to this Count.

Count 33

The accused ARAKI, DOHIHARA, HIRANUMA, HIROTA, HOSHINO, ITAGAKI, KIDO, MATSUOKA, MUTO, NAGANO, SHIGEMITSU and TOJO, on and after the 22nd September, 1940, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Republic of France.

The same Particulars, Treaty Articles and Assurances as in Count 15, relate to this Count.

Count 34

All the accused, between the 7th December, 1941, and the 2nd September, 1945, waged a war

of aggression and a war in violation of international law, treaties, agreements, and assurances, against the Kingdom of Thailand.

The same Particulars and Treaty Articles as in Count 24, relate to this Count.

Count 35

The same accused as in Count 25, during the summer of 1938, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Union of Soviet Socialist Republics.

The same Particulars, Treaty Articles and Assurances as in Count 17, relate to this Count.

Count 36

The same accused as in Count 26, during the summer of 1939, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances against the Mongolian People's Republic and the Union of Soviet Socialist Republics.

The same Particulars, Treaty Articles and Assurances as in Count 17, relate to this Count.

GROUP TWO: MURDER

The following Counts charge the crimes of murder, and conspiracy to murder, being acts for which it is charged that the persons named and each of them are individually responsible, being at the same time Crimes against Peace, Conventional War Crimes, and Crimes against Humanity, contrary to all the paragraphs of Articles 5 of the said Charter, to International

Law, and to the domestic laws of all the countries where committed, including Japan, or to one or more of them.

Count 37

The accused DOHIHARA, HIRANUMA, HIROTA, HOSHINO, KAYA, KIDO, KIMURA, MUTO, NAGANO, OKA, OSHIMA, SATO, SHIMADA, SUZUKI, TOGO and TOJO, together with other persons, between the 1st June, 1940, and the 8th December, 1941, participated as leaders, organisers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy, and are responsible for all acts performed by any person in execution of such plan.

The object of such plan or conspiracy was unlawfully to kill and murder the persons described below, by initiating unlawful hostilities against the United States of America, the Commonwealth of the Philippines, the British Commonwealth of Nations, the Kingdom of the Netherlands and the Kingdom of Thailand (Siam), and by unlawfully ordering, causing and permitting the armed forces of Japan to attack the territory, ships and airplanes of the said nations or some of them at times when Japan would be at peace with the said nations.

The persons intended to be killed and murdered were all such persons, both members of the armed forces of the said nations and civilians, as might happen to be in the places at the times of such attacks.

The said hostilities and attacks were unlawful because they were breaches of Treaty Article 5 in Appendix B, and the accused and the said armed

forces of Japan could not therefore, acquire the rights of lawful belligerents.

Each of the accused intended that such hostilities should be initiated in breach of such Treaty Article, or were reckless whether such Treaty Article would be violated or not.

Count 38

The accused DOHIHARA, HIRANUMA, HIROTA, HOSHINO, KAYA, KIDO, KIMURA, MATSUOKA, MUTO, NAGANO, OKA, OSHIMA, SATO, SHIMADA, SUZUKI, TOGO and TOJO, together with other persons, between the 1st June, 1940, and the 8th December, 1941, participated as leaders, organisers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy, and are responsible for all acts performed by any person in execution of such plan.

The object of such plan or conspiracy was unlawfully to kill and murder the persons described below, by initiating unlawful hostilities against the United States of America, the Commonwealth of the Philippines, the British Commonwealth of Nations, the Kingdom of the Netherlands and the Kingdom of Thailand (Siam), and unlawfully ordering, causing and permitting the armed forces of Japan to attack the territory, ships and airplanes of the said nations or some of them.

The persons intended to be killed and murdered were all such persons, both members of the armed forces of the said nations and civilians, as might happen to be in the places at the times of such attacks.

The said hostilities and attacks were unlawful because they were breaches of Treaty Articles 6,

7, 19, 33, 34, and 36 in Appendix B and the accused and the said armed forces of Japan could not, therefore, acquire the rights of lawful belligerents;

Each of the accused intended that such hostilities should be initiated in breach of such Treaty Articles, or were reckless whether such Treaty Articles or any if them would be violated or not.

Count 39

The same accused as in Count 38, under the circumstances alleged in Counts 37 and 38, by ordering, causing and permitting the armed forces of Japan to attack the territory, ships and airplanes of the United States of America, with which nation Japan was then at peace, at Pearl Harbor, Territory of Hawaii, on the 7th December, 1941, at about 0755 hours (Pearl Harbor time), unlawfully killed and murdered Admiral Kidd and about 4,000 other members of the naval and military forces of the United States of America and certain civilians whose names and number are at present unknown.

Count 40

The same accused as in Count 38, under the circumstances alleged in Counts 37 and 38, by ordering, causing and permitting the armed forces of Japan to attack the territory and airplanes of the British Commonwealth of Nations, with which nations Japan was then at peace, at Kota Bahru, Kelantan, on the 8th December, 1941, at about 0025 hours (Singapore time), unlawfully killed and murdered certain members of the armed forces of the British Commonwealth

of Nations whose names and number are at present unknown.

Count 41

The same accused as in Count 38, under the circumstances alleged in Counts 37 and 38, by ordering, causing and permitting the armed forces of Japan to attack the territory, ships and airplanes of the British Commonwealth of Nations, with which nations Japan was then at peace, at Hong Kong, on the 8th December, 1941, at about 0800 hours (Hong Kong time), unlawfully killed and murdered certain members of the armed forces of the British Commonwealth of Nations, whose names and number are at present unknown.

Count 42

The same accused as in Count 38, under the circumstances alleged in Counts 37 and 38, by ordering, causing and permitting the armed forces of Japan to attack H. M. S. *Petrel,* a ship of the British Commonwealth of Nations, with which nations Japan was then at peace, at Shanghai on the 8th December, 1941, at about 0300 hours (Shanghai time), unlawfully killed and murdered three members of the naval forces of the British Commonwealth of Nations, whose names are at present unknown.

Count 43

The same accused as in Count 38, under the circumstances alleged in Counts 37 and 38, by ordering, causing and permitting the armed forces of Japan to attack the territory of the Commonwealth of the Philippines, with which

nation Japan was then at peace, at Davao, on the 8th December, 1941, at about 1000 hours (Manila time) unlawfully killed and murdered certain members of the armed forces of the United States of America and of the armed forces and civilians of the Commonwealth of the Philippines, whose names and number are at present unknown.

Count 44

All the accused together with other persons, between the 18th September, 1931, and the 2nd September, 1945, participated as leaders, organisers, instigators or accomplices in the formulation or execution of a common plan or conspiracy, and are responsible for all acts performed by any person in execution of such plan.

The object of such plan or conspiracy was to procure and permit the murder on a wholesale scale of prisoners of war, members of the armed forces of countries opposed to Japan who might lay down their arms, and civilians, who might be in the power of Japan, on land or sea, in territories occupied by Japan, and crews of ships destroyed by Japanese forces, in ruthless pursuit of victory in the unlawful wars in which Japan was, or would, during the said period be engaged.

Count 45

The accused ARAKI, HASHIMOTO, HATA, HIRANUMA, HIROTA, ITAGAKI, KAYA, KIDO, MATSUI, MUTO, SUZUKI and UMEZU, on the 12th December, 1937, and succeeding days, by unlawfully ordering, causing and permitting the armed forces of Japan to attack the City of Nanking in breach of the Treaty Articles mentioned in Count 2 hereof and to

slaughter the inhabitants contrary to international law, unlawfully killed and murdered many thousands of civilians and disarmed soldiers of the Republic of China, whose names and number are at present unknown.

Count 46.

The same accused as in Count 45, on the 21st October, 1938, and succeeding days, by unlawfully ordering, causing and permitting the armed forces of Japan to attack the City of Canton in breach of the Treaty Articles mentioned in Count 2 hereof and to slaughter the inhabitants contrary to international law, unlawfully killed and murdered large numbers of civilians and disarmed soldiers of the Republic of China, whose names and number are at present unknown.

Count 47

The same accused as in Count 45, prior and subsequent to the 27th October, 1938, by unlawfully ordering, causing and permitting the armed forces of Japan to attack the City of Hankow in breach of the Treaty Articles mentioned in Count 2 hereof and to slaughter the inhabitants contrary to international law, unlawfully killed and murdered large numbers of civilians and disarmed soldiers of the Republic of China, whose names and number are at present unknown.

Count 48

The accused HATA, KIDO, KOISO, SATO, SHIGEMITSU, TOJO and UMEZU, prior and subsequent to the 18th June, 1944, by unlawfully ordering, caus-

ing and permitting the armed forces of Japan to attack the City of Changsha in breach of the Treaty Articles mentioned in Count 2 hereof and to slaughter the inhabitants contrary to international law, unlawfully killed and murdered many thousands of civilians and disarmed soldiers of the Republic of China, whose names and number are at present unknown.

Count 49

The same accused as in Count 48, prior and subsequent to the 8th August, 1944, by unlawfully ordering, causing and permitting the armed forces of Japan to attack the City of Hengyang in the Province of Hunan in breach of the Treaty Articles mentioned in Count 2 hereof and to slaughter the inhabitants contrary to international law, unlawfully killed and murdered large numbers of civilians and disarmed soldiers of the Republic of China, whose names and number are at present unknown.

Count 50

The same accused as in Count 48, prior and subsequent to the 10th November, 1944, by unlawfully ordering, causing and permitting the armed forces of Japan to attack the Cities of Kweilin and Liuchow in the Province of Kwangsi in breach of the Treaty Articles mentioned in Count 2 hereof and to slaughter the inhabitants contrary to international law, unlawfully killed and murdered large numbers of civilians and disarmed soldiers of the Republic of China, whose names and numbers are at present unknown.

Count 51

The accused ARAKI, DOHIHARA, HATA, HIRANUMA, ITAGAKI, KIDO, KOISO, MATSUI, MATSUOKA, MUTO, SUZUKI, TOGO, TOJO and UMEZU, by ordering, causing and permitting the armed forces of Japan to attack the territories of Mongolia and the Union of Soviet Socialist Republics, with which nations Japan was then at peace, in the region of the Khalkhin-Gol River in the summer of 1939, unlawfully killed and murdered certain members of the armed forces of Mongolia and the Union of Soviet Socialist Republics, whose names and number are at present unknown.

Count 52

The accused ARAKI, DOHIHARA, HATA, HIRANUMA, HIROTA, HOSHINO, ITAGAKI, KIDO, MATSUOKA, MATSUI, SHIGEMITSU, SUZUKI and TOJO by ordering, causing and permitting the armed forces of Japan to attack the territory of the Union of Soviet Socialist Republics, with which nation Japan was then at peace, (in the region of Lake Khasan in the months of July and August 1938) unlawfully killed and murdered certain members of the armed forces of the Union of Soviet Socialist Republics, whose names and number are at present unknown.

GROUP THREE: OTHER CONVENTIONAL WAR CRIMES AND CRIMES AGAINST HUMANITY

The following Counts charge conventional War Crimes and Crimes against Humanity, being acts for which it is charged that each of the persons named are individually responsible, in accord-

ance with Article 5 and particularly Article 5 (b) and (c) of the Charter of the International Military Tribunal for the Far East, and in accordance with International Law.

Count 53

The accused, DOHIHARA, HATA, HOSHINO, ITAGAKI, KAYA, KIDO, KIMURA, KOISO, MUTO, NAGANO, OKA, OSHIMA, SATO, SHIGEMITSU, SHIMADA, SUZUKI, TOGO, TOJO and UMEZU, together with other persons, between the 7th December, 1941, and the 2nd September, 1945, participated as leaders, organisers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy, and are responsible for all acts performed by any person in execution of such plan.

The object of such plan or conspiracy was to order, authorise and permit the Commanders-in-Chief of the several Japanese naval and military forces in each of the several theatres of war in which Japan was then engaged, the officials of the Japanese War Ministry, the persons in charge of each of the camps and labour units for prisoners of war and civilian internees in territories of or occupied by Japan, the military and civil police of Japan, and their respective subordinates, frequently and habitually to commit the breaches of the Laws and Customs of War, as contained in and proved by the Conventions, assurances and practices referred to in Appendix D, against the armed forces of the countries hereinafter named and against many thousands of prisoners of war and civilians then in the power of Japan belonging to the United States of America, the British Commonwealth of Nations, the Republic

of France, the Kingdom of the Netherlands, the Commonwealth of the Philippines, the Republic of China, the Republic of Portugal and the Union of Soviet Socialist Republics; and that the Government of Japan should abstain from taking adequate steps, in accordance with the said Conventions and assurances and Laws and Customs of War, to secure observance and prevent breaches thereof.

In the case of the Republic of China, the said plan or conspiracy began on the 18th September, 1931, and the following accused participated therein in addition to those above-named: ARAKI, HASHIMOTO, HIRANUMA, HIROTA, MATSUI, MATSUOKA, MINAMI.

Count 54

The accused DOHIHARA, HATA, HOSHINO, ITAGAKI, KAYA, KIDO, KIMURA, KOISO, MUTO, NAGANO, OKA, OSHIMA, SATO, SHIGEMITSU, SHIMADA, SUZUKI, TOGO, TOJO and UMEZU, between the 7th December, 1941, and the 2nd September, 1945, ordered, authorised and permitted the commanders-in-chief and other persons mentioned in Count 53 to commit the offences therein mentioned and thereby violated the laws of War.

In the case of the Republic of China the said orders, authorizations and permissions were given in a period beginning on the 18th September, 1931, and the following accused were responsible for the same in addition to those named above: ARAKI, HASHIMOTO, HIRANUMA, HIROTA, MATSUI, MATSUOKA, MINAMI.

Count 55

The accused DOHIHARA, HATA, HOSHINO, ITAGAKI, KAYA, KIDO, KIMURA, KOISO, MUTO, NAGANO, OKA, OSHIMA, SATO, SHIGEMITSU, SHIMADA, SUZUKI, TOGO, TOJO and UMEZU, between the 7th December, 1941, and the 2nd September, 1945, being by virtue of their respective offices responsible for securing the observance of the said Conventions and assurances and the laws and Customs of War in respect of the armed forces in the countries hereinafter named and in respect of many thousands of prisoners of war and civilians then in the power of Japan belonging to the United States of America, the British Commonwealth of Nations, the Republic of France, the Kingdom of the Netherlands, the Commonwealth of the Philippines, the Republic of China, the Republic of Portugal and the Union of Soviet Socialist Republics, deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war.

In the case of the Republic of China, the said offence began on the 18th September, 1931, and the following accused were responsible for the same in addition to those named above: ARAKI, HASHIMOTO, HIRANUMA, HIROTA, MATSUI, MATSUOKA, MINAMI.

Wherefore, this Indictment is lodged with the Tribunal, and the charges herein made against the above-named accused are hereby presented by the Tribunal.

JOSEPH B. KEENAN
Chief of Counsel, acting on behalf of the United States of America.

HSIANG CHE-CHUN
Associate Counsel, acting on behalf of the Republic of China.

A. S. COMYNS CARR
Associate Counsel, acting on behalf of the United Kingdom of Great Britain and Northern Ireland.

S. A. GOLUNSKY
Associate Counsel, acting on behalf of the Union of Soviet Socialist Republics.

A. J. MANSFIELD
Associate Counsel, acting on behalf of the Commonwealth of Australia.

H. G. NOLAN
Associate Counsel, acting on behalf of Canada.

ROBERT ONETO
Associate Counsel, acting on behalf of the Republic of France.

W. G. F. BOEGERHOFF MULDER
Associate Counsel, acting on behalf of the Kingdom of the Netherlands.

R. H. QUILLIAM
Associate Counsel, acting on behalf of New Zealand.

P. P. GOVINDA MENON
A. S. COMYNS CARR
Associate Counsel, acting on behalf of India.

PEDRO LOPEZ
Associate Counsel, acting on behalf of the Commonwealth of the Philippines.

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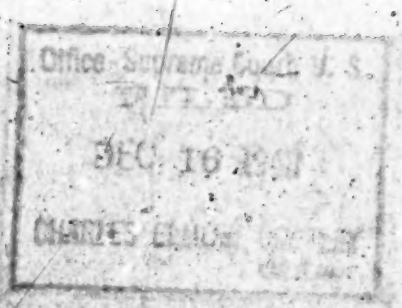

Nos. 239, 240, and 248 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1948

KOKI HIROTA, PETITIONER

v.

GENERAL OF THE ARMY DOUGLAS MACARTHUR, ET AL.

KENJI DOHIHARA, PETITIONER

v.

GENERAL OF THE ARMY DOUGLAS MACARTHUR, ET AL.

KOICHI KIDO, TAKASUMI OKA, KENRYO SATO, SHIGETABO SHIMADA AND SHIGENORI TOGO, PETITIONERS

v.

GENERAL OF THE ARMY DOUGLAS MACARTHUR, ET AL.

ON MOTIONS FOR LEAVE TO FILE PETITIONS FOR WRITS OF HABEAS CORPUS

SUPPLEMENT TO DOCUMENTARY APPENDIX

SUPPLEMENT TO DOCUMENTARY APPENDIX

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Letter of December 15, 1948, From the Secretary General, Far Eastern Commission, to the Acting Secretary of State

December 15, 1948.

My Dear Mr. Lovett: On December 10, 1948, the United States Delegation on the Far Eastern Commission placed before that body a letter from the Solicitor General to the Secretary of State, also of December 10, in which it was stated that "the Department of Justice wishes the Department of State to ascertain from the Far Eastern Commission whether the Far Eastern Commission regards the International Military Tribunal as an international court, appointed and acting under international authority, or as an American tribunal, appointed and acting under the unilateral authority of the United States; and specifically whether it regards the action of the Supreme Commander for the Allied Powers in proclaiming the establishment of the International Military Tribunal for the Far East, approving and amending the charter of that Tribunal, appointing as judges of the Tribunal the persons nominated by the individual governments represented in the Far Eastern Commission, and approving, after consultation, the sentences imposed by the Tribunal, as being in accordance with Paragraph 5

of the Far Eastern Commission's policy decision of April 3, 1946, and as taken in accordance with the authority and direction of the Far Eastern Commission."

The Far Eastern Commission, at its one hundred thirty-second meeting on December 15, approved the following statement which I hereby certify to be a true and exact copy of the original text:

> The Far Eastern Commission has taken note of the question asked by the Department of Justice of the United States, and in reply states that the International Military Tribunal for the Far East is an international court, appointed and acting under international authority; and that it regards the action of the Supreme Commander for the Allied Powers in proclaiming the establishment of the International Military Tribunal for the Far East, in approving and amending the charter of that tribunal; in appointing as judges of the Tribunal the persons nominated by the individual governments represented in the Far Eastern Commission; and in approving, after consultation, the sentences imposed by the tribunal, as in accordance with FEC policy decision of April 3, 1946, and as taken in

accordance with the authority and direction of the Far Eastern Commission.

Sincerely yours,

(Sgd.) NELSON T. JOHNSON,
Secretary General.

The Honorable ROBERT A. LOVETT,
Acting Secretary of State
Department of State

13 AUGUST 1945

DIRECTIVE TO THE SUPREME COMMANDER FOR THE ALLIED POWERS

In accordance with the agreement among the Governments of the United States, Chinese Republic, United Kingdom, and Union of Soviet Socialist Republics to designate a Supreme Commander for the Allied Powers for the purpose of enforcing the surrender of Japan, you are hereby designated as the Supreme Commander for the Allied Powers.

You will require the issuance of a proclamation signed by the Emperor authorizing his representatives to sign the instrument of surrender. The proclamation to be signed should be substantially in the form appended hereto. You will take the necessary steps to require and receive from the duly authorized representatives of the Japanese Emperor, the Japanese Government, and the Japanese Imperial General Headquarters the signed instrument of surrender. The text of the instrument of surrender is appended hereto. You will accept the surrender for the four Governments concerned and in the interests of the other United Nations at war with Japan.

I have asked the heads of state of China, Great Britain, and the Union of Soviet Socialist Republics each to designate a representative who may be present with you at the time and place of surrender. I have designated Fleet Admiral

Chester W. Nimitz to be present as the United States representative for this purpose. As soon as I have received the other designations you will be advised. You will make the appropriate arrangements.

Having accepted the general surrender of Japanese armed forces, you will require the Japanese Imperial General Headquarters to issue general orders which will instruct Japanese commanders wherever situated as to the mechanics of surrender and other details effectuating the surrender. You will effect any necessary coordination of arrangements with the Japanese Imperial General Headquarters with regard to the surrenders to the Allied Commanders concerned of Japanese armed forces abroad.

From the moment of surrender, the authority of the Emperor and Japanese Government to rule the state will be subject to you and you will take such steps as you deem proper to effectuate the surrender terms.

You will exercise supreme command over all land, sea and air forces which may be allocated for enforcement in Japan of the surrender terms by the Allied Powers concerned.

Your appointment as Supreme Commander for the Allied Powers is effective upon receipt of this directive.

S. HARRY S. TRUMAN

Enclosures:

1. Proclamation.
2. Instrument of Surrender

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Supreme Court of the United States

Misc. No. 248

KOICHI KIDO, TAKASUMI OKA, KENRYO SATO, SHIGETARO SHIMADA and SHIGENORI TOGO, citizens and nationals of Japan, appearing by their attorney and next friend, William Logan, Jr.,

Petitioners,

vs.

1. General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers, 2. Lieut. General Walton H. Walker, individually and as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan, 3. James V. Forrestal, individually and as Secretary of National Defense of the United States, and 4. Kenneth C. Royall, individually and as Secretary, Department of the Army of the United States, and 5. General Omar H. Bradley, individually and as Chief of Staff of the United States Army,

Defendants.

BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF *HABEAS CORPUS*

JOHN W. CRANDALL,
Attorney of Record for Petitioners.

WILLIAM LOGAN, JR.,
JOHN G. BRANNON,
GEORGE YAMAOKA,
GEORGE A. FURNESS,
HELEN F. TUOHY,
Of Counsel.

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IN THE

Supreme Court of the United States

Misc. No. 248

KOICHI KIDO, TAKASUMI OKA, KENRYO SATO, SHIGETARO SHIMADA and SHIGENORI TOGO, citizens and nationals of Japan, appearing by their attorney and next friend, William Logan, Jr.,

Petitioners,

vs.

1. General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers, 2. Lieut. General Walton H. Walker, individually and as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan, 3. James V. Forrestal, individually and as Secretary of National Defense of the United States, and 4. Kenneth C. Royall, individually and as Secretary, Department of the Army of the United States, and 5. General Omar H. Bradley, individually and as Chief of Staff of the United States Army,

Defendants.

BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF *HABEAS CORPUS*

This hearing is before the Court on an application by Petitioners for leave to file petitions for writs of *habeas corpus* and for writs of *habeas corpus*. Similar applications and petitions have been presented to this Court on behalf of KOKI HIROTA, Number 239 Misc., KENJI DOIHARA, Number 240 Misc., and HEITARO KIMURA, *et al.*, Number 267 Misc. Some of the Petitioners in these cases have been sentenced to death and the others have received sentences of imprisonment ranging from seven years to life under a judgment and finding of the International Military Tribunal for the Far East at Tokyo on November 12, 1948. AN appeal from the finding and judgment was denied by General

of the Army Douglas MacArthur on November 23, 1948. Petitioners request this Court to issue writs of *habeas corpus*, stay the execution of the sentences, discharge them from the custody of the defendants and restore them to their liberty.

Jurisdiction

Jurisdiction of this Court is invoked under the Constitution of the United States, Article 3, Section 2, Subdivision 2, the United States Code, 28 U. S. C. 341, 451-462, and the discretionary power inherent in this Court in this unprecedented case.

Questions Presented

1. Has this Court power to review by writ of *habeas corpus* acts of the Executive and military authorities thereunder unconstitutionally legislating international law?

2. Has this Court power under the Constitution and 28 U. S. C. 341, 451-462 to issue a writ of *habeas corpus* where a subject or citizen of a foreign state and domiciled therein is held in custody under and by virtue or color of authority of the United States for an act done or omitted to be done under the right, title, authority, privilege, protection and exemption claimed under the commission, order or sanction of a foreign state or under color thereof, the validity and effect whereof depend upon the Law of Nations?

3. Have the President of the United States and the military authorities the right to legislate offenses against the Law of Nations when such right is specifically delegated to the Congress by the express terms of the Constitution?

Statement of Facts

On December 1, 1943, the executive heads of the governments of the United States of America, Republic of China and the United Kingdom issued a statement at the Cairo Conference which reads in part as follows:

> "The Three Great Allies are fighting this war to restrain and punish the aggression of Japan." (Pet. 5)

On July 26, 1945, the executive heads of the same governments issued the Potsdam Declaration, which reads in part as follows:

> "The terms of the Cairo Declaration shall be carried out * * *" and "* * * stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners." (Pet. 7, 8)

On August 14, 1945, General of the Army Douglas MacArthur was appointed Supreme Commander for the Allied Powers by President Truman. (Pet. 12)

On September 2, 1945, the Instrument of Surrender was signed on board the *U. S. S. Missouri* which states in part as follows:

> "We hereby undertake for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever action may be required by the Supreme Commander for the Allied Powers or by any other designated representative of the Allied Powers for the purpose of giving effect to that Declaration." (Pet. 9).

On September 6, 1945, a message prepared jointly by the Department of State, the War Department, and the

Navy Department and approved by the President, transmitted to General MacArthur through the Joint Chiefs of Staff, reads in part as follows:

> "1. The authority of the Emperor and the Japanese Government to rule the State is subordinate to you as Supreme Commander for the Allied Powers. You will exercise your authority as you deem proper to carry out your mission. Our relations with Japan do not rest on a contractual basis, but on an unconditional surrender. Since your authority is supreme, you will not entertain any question on the part of the Japanese as to its scope." and * * * "3. The statement of intentions contained in the Potsdam Declaration will be given full effect. It will not be given effect, however, because we consider ourselves bound in a contractual relationship with Japan as a result of that document. It will be respected and given effect because the Potsdam Declaration forms a part of our policy stated in good faith with relation to Japan and with relation to peace and security in the Far East." (See Appendix A.)

On September 6, 1945 the President of the United States approved a document prepared jointly by the Department of State, the War Department and the Navy Department on August 29, 1945 which states in part as follows:

> "Persons charged by the Supreme Commander or appropriate United Nations agencies with being war criminals, including those charged with having visited cruelties upon United Nations prisoners or other nationals, shall be arrested, tried and, if convicted, punished." (Occupation of Japan, Policy and Progress, The Department of State U. S. A., Publication 2671, Far Eastern Series 17.)

On December 27, 1945, the Foreign Ministers of the United States of America, the United Kingdom and the Union of Soviet Socialist Republics agreed, with the cor-

currence of China, for the establishment of an Allied Council for Japan, part of which reads as follows:

> "5. The Supreme Commander shall issue all orders for the implementation of the Terms of Surrender, the occupation and control of Japan, and directives supplementary thereto. In all cases action will be carried out under and through the Supreme Commander who is the sole executive authority for the Allied Powers in Japan. He will consult and advise with the Council in advance of the issuance of orders on matters of substance, the exigencies of the situation permitting. His decisions upon these matters shall be controlling." (See Appendix B.)

The Joint Chiefs of Staff issued a directive to General of the Army Douglas MacArthur as Supreme Commander for the Allied Powers defining war crimes as including "crimes against peace," "crimes against humanity," "conspiracy to commit same" and "conventional war crimes" and granting to him:

> "* * * power (a) to appoint special international military courts (which term shall be held to mean tribunals of any kind), composed of military or naval officers or civilians of two or more of the United Nations, for the trial, under any applicable law, domestic or international, including the laws and customs of war, of Far Eastern war criminals where the alleged offenders are, in the Supreme Commander's opinion, appropriately to be tried by an international court; and (b) to prescribe or approve rules of procedure for such tribunals. The appointment of any such international court will be discussed by the Supreme Commander or his designated representative in advance with the appropriate local officers or representatives of each nation to be represented upon such a court and fair arrangements will be made for appropriate representation of each such nation upon the court. No such officer or civilian will be appointed to serve upon such a court without the approval of the local commander of the forces of his nation or such other officials as any nation may pre-

scribe to give such approval for its own nationals. In the appointment of any such international court and in all trials before it, the international character of the court and of the authority by which it is appointed should be properly recognized and emphasized, particularly in dealings with the Japanese people. Until further authorization by the Joint Chiefs of Staff, no international court for the trial of persons charged with offenses of the type described in paragraph 1. A. above will be established by the Supreme Commander. In submitting any plan for the appointment of such a court, you should specify the particular offenses and alleged offenders to be tried before the court and the nature of the coordination of the plan effected by you on a military level with representatives of the nations to be represented upon the court. * * *" (Appendix "D", Draft, Joint Chiefs of Staff, Directive on the Identification, Apprehension and Trial of Persons Suspected of War Crimes—JCS 1512.)

On January 19, 1946, General of the Army Douglas MacArthur and Supreme Commander for the Allied Powers, issued a Special Proclamation for the establishment of an International Military Tribunal for the Far East (Pet. 11-13) and on the same day promulgated the Charter of the International Military Tribunal for the Far East. (Pet. 13.)

On February 15, 1946, General of the Army Douglas MacArthur appointed the various nominees of their respective countries of the members of the Far Eastern Commission to be judges of the International Military Tribunal for the Far East. (Pet. 21-22.)

On April 3, 1946 the Far Eastern Commission issued a *policy decision* which, among other things, defined "crimes against peace," "crimes against humanity," "conspiracy to commit same" and "conventional war crimes." It also mentioned the Supreme Commander's power to establish international military courts, the appointment by the Su-

preme Commander of judges nominated by each state on the Far Eastern Commission to participate in the work of such court and a review of the decisions of such courts by the Supreme Commander. The wording of this policy decision is practically identical with the previous directive issued to General of the Army Douglas MacArthur by the Joint Chiefs of Staff of the United States. (Appendix "D" Draft, Joint Chiefs of Staff, Directive on the Identification, Apprehension and Trial of Persons Suspected of War Crimes—JCS 1512.) (See Appendix C.)

On April 26, 1946 General of the Army Douglas MacArthur issued General Order Number 20 amending the Charter of the International Military Tribunal for the Far East. (Ret. 13-21.)

All petitioners pleaded not guilty to the indictment which contained fifty-five counts charging various crimes during the period of time from January 1, 1928 to September 2, 1945. The indictment included counts charging "crimes against peace," "crimes against humanity," "conspiracy to commit same" and "conventional war crimes." After two years of taking evidence and on November 12, 1948 the Tribunal rendered a majority finding and judgment. Petitioners in the instant case were found guilty only of "crimes against peace," and acquitted of all the other charges. Major General Myron C. Cramer, appointed by General of the Army Douglas MacArthur as a judge representing the United States of America, was one of the judges constituting the majority.

On November 23, 1948 defendant General of the Army Douglas MacArthur denied the appeals of petitioners and issued an order commanding defendant Lieut. General Walton H. Walker, an officer of the United States Army, to carry out the sentence as pronounced by the Tribunal and affirmed by General of the Army Douglas MacArthur as Supreme Commander for the Allied Powers. Petitioners at the present time are being detained in Sugamo Prison,

Tokyo, by the officers and men of the 8th Army of the United States. Some of the Petitioners here and those in the companion petitions were civilian ministers of state and others officers in the military branch of the Japanese Government.

Of the eleven judges who presided at the Tribunal, Mr. Justice PAL of India, Mr. Justice ROLING of the Netherlands and Mr. Justice BERNARD of France dissented from the judgment of the Tribunal. Sir William Webb, President of the Tribunal, wrote a separate dissenting opinion suggesting imprisonment rather than hanging for the seven sentenced to death.

POINT I

This Court has jurisdiction to issue writs of *habeas corpus* to these petitioners.

These petitions raise questions which on the surface may appear to indicate a request to have this Court interfere with delicate affairs of an international nature. This Court is not called upon to review the acts of other countries. Fundamentally, however, the issues are of a momentous national character involving as they do the power and authority of the Executive branch of the United States Government and the military authorities thereunder regarding Petitioners which this Court in the interests of the United States and in the interest of engagements with other nations should resolve. These interests transcend international expediency.

In the determination of the question of the jurisdiction of this Court to grant the relief requested by Petitioners, consideration first must be given to the question of whether the International Military Tribunal for the Far East was

in fact and in law an international court or in reality a creation and enterprise of the Executive of the United States and the military authorities thereunder.

(A) The history of the International Military Tribunal for the Far East shows that it was constituted under color of the authority of the United States of America

Whatever power the International Military Tribunal for the Far East possessed originated and stemmed from the Executive authority of the United States and not from any international treaty. This branch of the United States Government with the concurrence of the military authorities gave birth to the Tribunal and clothed it with authority prohibited by the Constitution and laws of the United States, as will be hereinafter shown.

It is the Petitioners' contention that the acts of the United States were never ratified by the Allied Nations. Their actions to have any international validity require an international treaty solemnly arrived at as such. The nations in the past, although attempts were made at numerous times, were never able to agree even at a definition of the term "aggressive war". There never has been any international treaty defining "crimes against peace," "crimes against humanity," and "conspiracy to commit them", as pointed out by Mr. Justice ROLING, member from the Netherlands, in his dissenting opinion, where he carefully reviewed the development of international law through the Treaty of Versailles, the Pact of Paris, the Treaty of Mutual Assistance, the Geneva Protocol, Assemblies of the League of Nations and concluded:

> "From the above, it follows that 'crimes against peace' were not regarded true crimes before the London Agreement, and were not considered as such before the end of 1943.
>
> . . . .

> "As indicated above, aggression was not considered a true crime before and in the beginning of this war, and could not be considered as such for lack of those conditions in international relations on which such a view could be based."

We submit that it can not now be seriously contended that this was accomplished by the Far Eastern Commission. The representatives of this commission were never clothed with any such authority by their respective countries. Yet it is claimed that this has been achieved in this trial, although the majority of the judges have found themselves without power to determine for themselves what is the applicable international law holding that they were bound by the definition of laws and crimes as set forth in the Charter promulgated by General of the Army Douglas MacArthur.

It can not seriously be contended that the pronouncements at the Cairo Conference and the Potsdam Declaration constituted treaties. They were merely unilateral expressions of might or intentions. As was said by Mr. Justice PAL, member from India, in his dissent from the majority opinion of the Tribunal:

> "*These declarations are mere announcements of the intention of the Allied Powers.* They have no legal value. They do not by themselves give rise to any legal right in the United Nations. The Allied Powers themselves disown any contractual relation with the vanquished on the footing of these Declarations. (Vide Paragraph 3 of the authority of the Supreme Commander.)"

The appointment of General of the Army Douglas MacArthur as Supreme Commander for the Allied Powers on August 14, 1945 was strictly a United States national executive act as was the directive to him on September 6, 1945 authorizing him to exercise his authority as he deemed proper to carry out his mission as Supreme Commander for the Allied Powers.

The Instrument of Surrender is not an international treaty and it can not be contended that any international court established thereunder would attain validity under the Law of Nations. Mr. Justice PAL, member from India, in his dissenting opinion quoted Professor Hans Kelsen of the University of California, who said:

> "If individuals shall be punished for acts which they have performed as acts of state, *by a court of another state, or by an international court*, the legal basis of the trial, as a rule, *must be an international treaty* concluded with the state whose acts shall be punished, *by which treaty* jurisdiction over these individuals is conferred upon the national or international court." (Italics ours.)

Mr. Justice PAL stated:

> "*Here there is no such treaty;* and the terms of authority of the Supreme Commander make it expressly clear that any power conferred on him is not in any way derived from the vanquished through any contractual relationship.
>
> "From what has been stated above it seems amply clear that if the *Allied Powers as victors have not, under the international law, the legal* right to treat such persons as war criminals, they have not derived any such right by a treaty or otherwise. The Allied Powers have nowhere given the slightest indication of their intention to assume any power which does not belong to them in law."

In the Special Proclamation issued by defendant General of the Army Douglas MacArthur on January 16, 1946 for the establishment of the International Military Tribunal for the Far East, the Potsdam Declaration and the Instrument of Surrender are relied upon by him as the basis for his international authority. Since these documents are not international treaties, the Charter for the International Military Tribunal for the Far East which he promulgated on the same day was void of international legality.

The Moscow Agreement of December 26, 1945, also mentioned in the Special Proclamation, merely authorized General of the Army Douglas MacArthur as Supreme Commander for the Allied Powers to issue orders to implement the Terms of Surrender. Neither the Far Eastern Commission which issued its policy decision on April 3, 1946 nor the Allied Council was a legislative body authorized to legislate international penal laws. There was an absence of either an international constitution in fact or in law and an international legislature in fact or in law authorized to establish the International Military Tribunal for the Far East and define international crimes.

The judges were not appointed to the Tribunal by their respective governments. They were nominated by their governments but the actual appointment to the Tribunal was made by General of the Army Douglas MacArthur as Supreme Commander for the Allied Powers. General of the Army Douglas MacArthur was free under Executive directive to appoint these nominees of the Allied Nations or some one else. As was said by Mr. Justice JARANILLA, member from the Republic of the Philippines, in his opinion concurring with the majority:

> "He could have created only a military commission composed of officers belonging to one nation. * * *"

The investigations and the accumulation of evidence were conducted in the main by American attorneys and investigators. The Chief Prosecutor was a United States citizen, employed solely by the United States Government. He was not appointed by the Allied Nations. A large staff of United States prosecuting attorneys was employed by the United States Government—not by any international body. The prosecuting attorneys of other nations were permitted to participate in the proceedings under the guidance, orders and direction of the Chief Prosecutor but not

pursuant to the terms of any international treaty. American attorneys were also employed by the United States War Department to assist Japanese counsel for the defense. They were not employed by any international body nor did any other nation provide defense attorneys for the accused.

Another instance of the lack of internationality of the Tribunal is the amended Charter itself which provides that sentence is to be carried out in accordance with the orders of the Supreme Commander for the Allied Powers who may at any time, approve, reduce or otherwise alter the sentence except to increase its severity. No participation in the review by any of the Allied Powers is provided for in the amended Charter.

(B) This Court has the power to issue writs of *habeas corpus* in this case

The Constitution of the United States is a living instrument. In keeping with changing conditions it should be so interpreted by this Court. Restricted, narrow and technical interpretations stifle justice. There are no limitations in the Constitution or Congressional acts warranting a rejection by this Court of the writs prayed for by petitioners. Judge STORY recognized the purposes and objects of our founding fathers when they adopted the Constitution in saying in *Martin* v. *Hunter*, 1 Wheaton 304:

> "The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen

what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which at the present might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests should require."

The Constitution of the United States, Article 3, Section 2, Subdivision 2 states:

"In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The United States Code, as amended in 1925, provides:

28 USC 451

"The Supreme Court and the District Courts shall have power to issue writs of habeas corpus."

28 USC 452

"Power of judges. The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. * * *"

28 USC 453

"The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof or is in custody for an act done or omitted in pursuance of a law of the United States, or of an

order, process, or decree of a court or judge thereof or is in custody in violation of the Constitution or of a law or treaty of the United States; or, *being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations;* or unless it is necessary to bring the prisoner into court to testify." (Italics ours.)

The facts of the present case fit squarely within these provisions of the Code. This Court has held:

> "The definite aim of the 1925 Act was to enlarge, not to destroy the Court's discretionary jurisdiction." (Ex Parte Peru, 318 U. S. 578.)

The compelling reason for the issuance of the writs requested is succinctly stated in *Ex Parte Steiwart* (47 Fed. Sup. 410, 412).

> "For it is the function of the writ of habeas corpus to question the right of any agency of the Government to deprive a person of his liberty at any stage when a person is put under restraint by an authority, the legitimacy of which, *or of the effects of which*, he challenges. Constitution of the United States, Art. I, Sec. 9, Clause 2; 28 U. S. C. A. Sec. 453; In re Neagle, 1890, 135 U. S. 1, 40-43, 10 S. Ct. 658, 34 L. Ed. 55; Mooney v. Holohan, 1935, 294 U. S. 103, 113, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406; Johnson v. Zerbst, 1938, 304 U. S. 458, 465, 58 S. Ct. 1019, 82 L. Ed. 1461 McNally v. Hill, 1934, 293 U. S. 131, 55 S. Ct. 24, 79 L. Ed. 238; Bowen v. Johnston, 1939, 306 U. S. 19, 26, 59 S. Ct. 442, 83 L. Ed. 455 Walker v. Johnston, 1941, 312 U. S. 275, 61 S. Ct. 574, 85 L. Ed. 830; Smith v. O'Grady, 1941, 312 U. S. 329, 331 61 S. Ct. 572, 85 L. Ed. 859; Holiday v. Johnston, 1941, 313 U. S. 342, 350, 550, 61 S. Ct. 1015, 85 L. Ed. 1392; Waley v. Johnston, 1942, 316 U. S. 101, 62 S. Ct. 964, 86 L. Ed. 1302;

Angelus v. Sullivan, 2 Cir., 1917, 246 F. 54, 64. Absent congressional action, the writ cannot be denied even in wartime. See Ex parte Milligan, 1866, 4 Wall. 2, 125, 18 L. Ed. 281; Ex parte Quirin et al., 63 S. Ct. 1, 87 L. Ed. . . ., decided July 31, 1942."

The proper exercise of power by the Executive and Joint Chiefs of Staff being questioned in these proceedings necessitates action by this Court. Mr. Chief Justice HUGHES said in *Bowen* v. *Johnston* (306 U. S. 19):

> "It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired. *Ex parte Lange, supra.* The rule requiring resort to appellate procedure when the trial court has determined its own jurisdiction of an offense is not a rule denying the power to issue a writ of *habeas corpus* when it appears that nevertheless the trial court was without jurisdiction. The rule is not one defining power but one which relates to the appropriate exercise of power. It has special application where there are essential questions of fact determinable by the trial court. *Rodman* v. *Bothick, supra.* It is applicable also to the determination in ordinary cases of disputed matters of law whether they relate to the sufficiency of the indictment or to the validity of the statute on which the charge is based. *Id.; Glasgow* v. *Moyer, supra; Henry* v. *Henkel, supra.* But it is equally true that the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent."

See also:

Ex parte Burrus, 136 U. S. 586.

This Court has jurisdiction on the ground that the International Military Tribunal for the Far East is in fact a court created by executive order of the United States

dicts military authorities and it has jurisdiction to issue its of habeas corpus to review the actions of the esident and military officials of the United States Gov- nment. The present application is of major public im- rtance warranting the exercise of discretion by this urt to issue the writs.

"In view of the public importance of the ques tions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we con- sider and decide those questions without any avoid- able delay, we directed that petitioners' applications be set down for full oral argument at a special term of this Court, convened on July 29, 1942." (Ex parte Quirin, 317 U. S. 1)

There is no federal court such as our Federal District urt functioning in the Military Occupied Territory of pan to which petitioners can apply. Therefore, unless s Court takes jurisdiction, petitioners have no other al recourse for *habeas corpus*. There is of course the ssibility of instituting a different type of ancillary pro- ding in a district court. The effect of this, however, uld be to bring before this Court by *certiorari* the iden- al matters which are now being expounded. Such proce- re would hardly be compatible with the need for imme- fe action in this unprecedented situation.

A petition for a writ of prohibition and or mandamus s been granted by this Court in a matter of public im- rtance and exceptional character. (*Ex parte Peru*, U. S. 578.) Certainly an application for a writ of *eas corpus* in the present case should receive equal if greater consideration. The majority of the Court, aking through Mr. Chief Justice STONE, in holding that Court had jurisdiction, reviewed its powers to issue

writs of *scire facias*, *habeas corpus* and prohibition and said:

> "We conclude that we have jurisdiction to issue the writ as prayed. And we think that—unless the sovereign immunity has been waived—the case is one of such public importance and exceptional character as to call for the exercise of our discretion to issue the writ rather than to relegate the Republic of Peru to the circuit court of appeals, from which it might be necessary to bring the case to this Court again by certiorari. The case involves the dignity and rights of a friendly sovereign state, claims against which are normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State."

See also:

Ex Parte Virginia, 100 U. S. 339.

Just as individuals in the conduct of their every day affairs, and public officials carrying out their duties in the various political subdivisions of the United States, must abide by the Constitution and laws of the United States at their own risk, so too must the Executive and the military authorities representing the United States Government be held legally responsible to perform their duties in a Constitutional manner and under the law of the land in their engagements with foreign powers. All such acts are subject to judicial scrutiny at a later date in a proper case.

POINT II

The result of the action of the International Military Tribunal for the Far East is that the President and military authorities of the United States have, without Congressional approval, created offenses against the Law of Nations.

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." (Const. of the U. S. Art. VI)

Clearly then, the fundamental law of the land is of three sources. Executive agreements of the President of the United States do not constitute the fundamental law of the land.

> "The Congress shall have Power . . . to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." (Const. of U. S. Art. I, Sec. 8, Clause 10)

> "Congress and the President like the Courts possess no power not derived from the Constitution." (Ex Parte Quirin, 317 U. S. 1, 25, 63 Sup. Ct. 2.)

The offense known as "crimes against peace" used as the basis of the charges in Nurnberg and Tokyo never existed heretofore as an offense against the Law of Nations. The Kellogg-Briand Pact or any other treaty or agreement between nations provided for no individual punishment for war defined as aggressive.

It was held in *Ex Parte Vallandigham*, 1 Wall. 243, 249:

> "It is affirmed in these instructions [orders of Secretary of War on 24 April 1863], that military juris-

diction is of two kinds. First, that which is conferred and defined by statute; second, that which is derived from the common law of war."

Said the Supreme Court in *Ex Parte Quirin, supra*:

> "It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions." (p. 29)

The Supreme Court recognized the worthiness of the allegation that Congress has the power to define offenses against the Law of Nations when, in *Ex Parte Quirin*, it answered the proposition by ruling that Congress through the Articles of War had incorporated by reference as within the jurisdiction of military commissions all offenses which are defined as such by the law of war. If the reasoning of the Supreme Court in *Ex Parte Quirin*, that Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals, be applied here in the instant case, it is readily observable that both are lacking for there is neither a common law of war which defines "crimes against peace" or definite statutes crystallizing said offense in permanent form.

> "The core of the Court's power to declare void acts of the legislature if inconsistent with the Constitution is based upon equality and independence of the judiciary—not superiority." (The Federalist (1818 Ed.) No. LX XVIII, p. 421, and statement of Hamilton therein.)

> "The authority of a court to restrain or hold in check executive power cannot be considered less important than the right to ignore unconstitutional legislative action." (MacLaughlin Cons. History of the U. S. p. 319.)

The Court has early in its history declared its right to hold unconstitutional legislative acts of the Congress (*Marbury v. Madison*). Said the Court in *Van Horne's Lessee v. Dorrance* (also cited PATTERSON), 2 Dallas 304, 309 (1795):

> "If a legislative act opposes a constitutional principle, the former must give way, and be rejected on the score of repugnance. . . . It is an important principle, which, in the discussion of questions of the present kind, ought never to be lost sight of, that the Judiciary on the contrary is not a subordinate, but coordinate, branch of the government."

There is no reason to believe, that upon factual provocation and the existence of a justiciable controversy, this Court may not so act in regard to unconstitutional executive acts.

Said T. M. Cooley, General Principles of International Law (p. 203, 4th ed.):

> "But when he (the President) exceeds his authority, or usurps that which belongs to one of the other departments, his orders, commands, or warrants protect no one, and his agents become personally responsible for their acts. The check of the courts, therefore, consists in their ability to keep the Executive within the sphere of his authority by refusing to give the sanction of the law to whatever he may do beyond it, and by holding the agents and instruments of his unlawful action to strict accountability."

The Supreme Court of the United States isolated the question involved in the *Ex Parte Quirin* case, saying:

> "We are concerned only with the question whether it is within the constitutional power of the National Government to place petitioners upon trial before a military commission for the offenses with which they are charged" (p. 25).

Here we are concerned only with the question of whether it is within the constitutional power of the Executive to agree with other nations to place petitioners upon trial before a military tribunal composed of representatives from several countries, for the offenses with which they are

charged. We must therefore first inquire whether any of the acts charged is an offense against the Law of Nations cognizable before a military tribunal of our own country. For certainly, that which we cannot lawfully do alone cannot by the means here employed become legal by its performance in conjunction with other nations.

Said the Court further, in *Ex Parte Quirin*, *supra*, at page 29:

> "We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunals here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by jury."

If we move the *situs* of this trial to Washington, D. C., before a purely American military commission, the most ardent advocate of the legality of "crimes against peace" would hardly contend that such could be charged as an offense against the petitioners. Yet fundamentally wherein does the current factual situation invite departure from this concept. It is the international complexion that encourages the proponents of the offense of "crimes against peace" to take their position regarding the legality thereof. Again we must advance the reasoning that an act not lawful if done by America alone, at least in the absence of treaty, or other legislative sanction, cannot become lawful when done in conjunction with other nations.

It is true that the Executive and Senate perhaps may do by treaty what the Congress of the United States could not have done through legislative enactment, and the test of the validity of a treaty is not the power of the government to do the same thing by an act of Congress (*State of Missouri* v. *Holland*, 40 Sup. Ct. 382, 252 U. S. 416). But even a treaty is invalid if in violation of or inconsistent with the Constitution (Butler on Treaties, Vol. II, par. 455,

p. 350; Crandall on Treaties, 2nd ed. p. 208; Fed. Stat. Ann. Vol. IX, p. 28; *Cherokee Tobacco* case, 11 Wall. 616, 20 L. Ed. 227; *U. S. v. Old Settlers*, 148 U. S. 427, 13 Sup. Ct. 650). "And this being true, the Court, in a proper case where the rights of citizens are involved, may so declare" (Michie's Ency. of U. S. Sup. Ct. Reports, Vol. XI, 640; *Head Money* Cases, 112 U. S. 580-598, 5 Sup. Ct. 247; *Ex parte Cooper*, 143 U. S. 472, 501-503; 12 Sup. Ct. 453; *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1; Also see *De Geofroy et al. v. Riggs, et al.*, 133 U. S. 258, 10 Sup. Ct. 295; 33 L. Ed. 642 for definition of limits of treaty-making powers as controlled by the Constitution).

There must be a justiciable controversy before the Court can act (*Kiyoshi Hirabayashi v. U. S.*, 63 Sup. Ct. 1375; 320 U. S. 81; 87 L. Ed. 1774 and also see 320 U. S. 707, 88 L. Ed. 414). Here we have a justiciable controversy unique and demanding in its nature, loudly proclaiming the need for judicial solution.

> "No doubt the courts should retain the power of review of governmental action to prevent the expansion of the executive power unwarranted by statute." (Ispass v. Pyramid Motor Freight Corp., 54 F. Supp. 565, 566.)

Until the filing of these petitions before the Supreme Court of the United States, it may have been considered purely a political matter; an arrangement between countries to try the defeated leaders. But as was said in *Rhode Island v. Massachusetts*, 12 Pet. 657, 737, involving a dispute over a boundary line between the states:

> "From the time of such submission, the question ceases to be a political one, to be decided by the *sic volo sic jubeo*, of political power."

In the case of *Mississippi v. Johnson*, 4 Wall. 475, 500, 18 L. Ed. 437, the question involved *was not* whether the President could be restrained from carrying out an act instigated and originally conceived by him, which was

claimed to be contrary to the Constitution (as in the instant case), but was "Can the President be restrained by injunction from carrying into effect an *act of Congress* alleged to be unconstitutional?" Chief Justice CHASE said:

> "The Congress is the Legislative Department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; *though the acts of both, when performed, are, in proper cases, subject to its cognizance*" (1, c. 441). (Italics ours.)

All orders of the President, or of the Secretary of War, issued under his authority, whether given by virtue of his constitutional office as Commander-in-Chief are, as statutory powers, of the full force of law (*U. S. v. Freeman*, 3 How. 556; *Smith v. Whitney*, 116 U. S. 167).

> "But in all cases those orders must, if issued by virtue of authority congressionally given, pursue the terms of the granting statute; and if issued by virtue of his constitutional authority, be in accordance with the generally accepted principles of international law and custom. When this is not done they will not justify the acts of subordinates acting under them." (Willoughby Const. Law of the U. S. p. 656, citing Little *v.* Barreme, 2 Cranch 170.)

Nor is it an answer to rely upon the war powers and the conduct and control of foreign affairs vested in the Executive, for no one could contend that the exercise of such powers, unhampered and discretionary as they may necessarily be during war, includes the right and power to legislate and define new and unrecognized crimes and to try petitioners thereunder and charge them with offenses not even within the contemplation or scope of the Potsdam Declaration and the Instrument of Surrender.

In *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 156, the Court said:

> "The war power of the United States like its other powers and the police power of the States, is subject to applicable constitutional limitations."

The Supreme Court of the United States has often declared, in unmistakable terms, that there can be no crime against the authority of the United States except where the forbidden act is defined and penalized by statute. (*U. S. v. Hudson*, 7 Cranch 32, 34.) Said the Court:

> "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."

See also *U. S. v. Coolidge, et al.*, 1 Wheat. 415; 4 L. Ed. 124.

In *Field v. Clark*, 143 U. S. 649; 12 Sup. Ct. 495, 504; 36 L. Ed. 294, it was said:

> "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."
>
> "It is fundamental that the citizen has the right to rely upon the statutes of the United States for the ascertainment of the acts which constitute an infraction of its law." (U. S. v. Mathews, D. C. 146 Fed. 306, 308, citing Sup. Ct. Case in Re Kollock, 165 U. S. 533; 41 L. Ed. 813)

It is unquestioned that the legislative functions of Congress may not be delegated by Congress to any executive or executive department (*Fahey v. Mellonnee*, 332 U. S. 245, 67 Sup. Ct. 1552, 91 L. Ed. 2030, reversing 68 Fed. Sup. 418).

The right of the Congress of the United States and individual members thereof to rely on preexisting international law such as that expressed and contained in the notes of the United States accompanying the execution and ratification of the Pact of Paris of 1928 regarding the question of resort to war in self defense is usurped by the Executive and military commitments of the United States through participation in and adherence to the law announced by said Tribunal. The majority ruling of the International

Military Tribunal for the Far East, adhered to by the American Justice thereof, decreed:

> "The right of self-defense does not confer upon the state resorting to war, the authority to make a final determination upon the justification of its action."

Prior to this time and through express provision of the Constitution of the United States the Congress was delegated the duty of declaring war and of determining for itself what factual situation gave rise to a war of self-defense. The deprivation of the immunity granted individual members of Congress under existing international law in deciding on the need for war has been nullified without their consent and hence is unconstitutional and void.

POINT III

The failure to comply with the Constitution of the United States and recognized principles of International Law has resulted in further abuses of justice.

Can this Court countenance the judgment of a court which is a creation and enterprise of the Executive and the military authorities, pursuant to a charter which deprived Petitioners of a fair and impartial trial? In declaring "crimes against peace," "crimes against humanity" and "conspiracy to commit them" to be crimes coming within the jurisdiction of the International Military Tribunal for the Far East, and defining these crimes the Charter foreclosed an examination by the members of the Tribunal as to whether or not these were and are international crimes. Their opinion that they were so foreclosed, resulted in the majority opinion. Mr. Justice PAL, member from India, in his dissenting opinion stated:

> "The so-called trial held according to the definition of crime *now* given by the victors obliterates

the centuries of civilization which stretch between us and the summary slaying of the defeated in a war. A trial with law thus prescribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. It does not correspond to any idea of justice. Such a trial may justly create the feeling that the setting up of a tribunal like the present is much more a political than a legal affair, an essentially political objective having thus been cloaked by a juridical appearance. Formalized vengence can bring only an ephemeral satisfaction, with every probability of ultimate regret; but vindication of law through *genuine legal process* alone may contribute substantially to the re-establishment of order and decency in international relations."

Mr. Justice PAL also stated:

"It is therefore pertinent to inquire what is the extent of *the lawful authority of a victor* over the vanquished in international relations. I am sure no one in this Twentieth Century would contend that even now this power is unlimited in respect of the person and the property of the defeated. Apart from the right of reprisal, the victor would no doubt have the right of punishing persons who had violated the laws of war. But to say that the victor can define a crime at his will and then punish for that crime would be to revert back to those days when he was allowed to devastate the occupied country with fire and sword, appropriate all public and private property therein, and kill the inhabitants or take them away into captivity. When international law will have to allow a victor nation thus to define a crime at its will, it will, like David Low's 'Peace', be surprised to find itself back on the same spot whence it started on its apparently onward journey several centuries ago. Perhaps humanity also will feel the same inward surprise though it may be civilized enough not to give any outward expression of the same."

The resulting acts of the Executive and Chiefs of Staff in defining the crimes and the limitations placed on the

Tribunal in the Charter executed by General of the Army Douglas MacArthur were also seriously questioned by Mr. Justice ROLING, member of the Netherlands, in his dissenting opinion:

> "Consequently, according to the majority judgment, the Tribunal, though called upon to mete out justice, is not the authority called upon to judge whether the victorious powers have stayed within the limits of international law. Members of an International Tribunal, therefore, could only refuse office or resign in case they regard the Charter as trespassing those limits, and leave their places to judges prepared to share the views as set out in the Charter.
>
> "This standpoint seems to be not only dangerous for the future, but incorrect at this moment.
>
> "It would be the worst possible service this Tribunal could render to the cause of international law if it should establish as a rule that an international tribunal, *called upon to mete out justice*, would have to apply the rules laid down by the Supreme Commander of the victorious nations, without having either the power or the duty to inquire whether it was applying rules of justice at all."

He also stated:

> "If it is correct to state that victorious powers have no authority to create new international crimes, but are bound by the provisions of existing international law, it follows that the Charter cannot decide the questions of whether a certain act or failure to act is a crime, but only whether a certain crime, acknowledged in international law, *comes within the jurisdiction of the Tribunal*. There can be no question of a Charter *making* certain activities criminal.*
>
> "Victorious powers may convene a Tribunal, may promulgate rules for its procedure, and may deter-

* "As, apparently, the majority judgment holds. Discussing the conspiracy to commit conventional war crimes, the judgment declares that 'conspiracies to commit such crimes are not made criminal by the Charter of the Tribunal' " (Judgment, p. 34).

> mine which acts or 'omissions' the Tribunal shall have the power to try and punish. It is the Tribunal which is called upon to decide whether those acts or 'omissions' are crimes under international law."

Mr. Justice BERNARD, member from France, said in his dissenting opinion:

> "From the above quoted statement, it must be concluded that according to the majority a substantive law is furnished by the Charter, that this substantive law is the one to be applied to the judgment of the Accused and that the Tribunal could not for any reason whatsoever refuse to apply it."

In the first sentence of the proclamation for the establishment of the International Military Tribunal for the Far East, General of the Army Douglas MacArthur recorded:

> "WHEREAS, the United States and the nations allied therewith in opposing the illegal wars of aggression of the Axis nations * * *."

This proclamation also foreclosed the members of the International Military Tribunal for the Far East from finding that Japan did not wage an aggressive war. By imposing upon the Tribunal two determinations,

1. that Japan waged an aggressive war and
2. that aggressive war is a crime,

the Tribunal was not free to make its own findings on these issues to the prejudice of Petitioners.

No citation of authority is needed to support the well-known practice of Anglo-Saxon courts to permit challenges for cause to be made to the judges, yet challenges to the individual members sitting on the International Military Tribunal for the Far East were prohibited on the theory that the Constitution of the Tribunal and the appointment of the respective justices had been directed by General of

the Army Douglas MacArthur, Supreme Commander for the Allied Powers.

Petitioners were deprived of a fair and impartial trial in that the indictment which was returned contained charges against the Petitioners relating to an alleged conspiracy and acts committed from January 1, 1928 to September 2, 1945. The Potsdam Declaration and the Instrument of Surrender can be read in vain for any indication that Petitioners were to be tried for any acts prior to December 7, 1941. Japan was not at war with any of the Allied Nations prior to December 7, 1941, unless we consider the undeclared war with China as being a war and several small border incidents with Russia, which were settled by treaty between Japan and Russia. Yet, Petitioners were tried and convicted for acts committed during two decades in which seventeen different cabinets rose and fell in Japan. Mr. Justice PAL in his dissenting opinion said:

> "The first substantial objection relating to the jurisdiction of the Tribunal is that the *crimes triable by this Tribunal must be limited to those committed in or in connection with the war which ended in the surrender* on 2 September 1945. In my judgment this objection must be sustained. It is preposterous to think that defeat in a war should subject the defeated nation and its nationals to trial for all the delinquencies of their entire existence. There is nothing in the Potsdam Declaration and in the Instrument of Surrender which would entitle the Supreme Commander or the Allied Powers to proceed against the persons who might have committed crimes in or in connection with any other war." . . .
>
> "In my opinion, therefore, crimes alleged to have been committed in or in connection with any conflict, hostility, incident or war not forming part of the war which ended in the surrender of the 2nd September, 1945 are outside the jurisdiction of the Tribunal."

The unfairness and prejudice to these Petitioners of the Tribunal in its majority opinion finding them guilty of

crimes for acts performed on behalf of the Japanese Government prior to December 7, 1941 is also succinctly set forth by Mr. Justice Roling, member for the Netherlands, in his dissenting opinion:

"From the Potsdam Declaration follows not only the limitation of the jurisdiction as to the offenses, but also a restriction as to persons. In the Potsdam Declaration are given the conditions on which 'Japan shall be given an opportunity to end this war.' One of these conditions was the meting out of stern justice to war criminals. It follows that our Charter can refer only to war criminals of *this war*, i.e., the war which led to Japan's surrender as formulated in the Instrument of Surrender. Consequently, this Tribunal has no jurisdiction to deal with war crimes committed in other wars, even if those wars happened to have been fought in the Far East and even if the perpetrators could thus also, in a wider sense, be referred to as 'major war criminals in the Far East,' (Charter, art. 1) or as 'Far Eastern War Criminals' (Charter, art. 5).

"This restriction to war crimes committed in the Pacific War is also indicated by the fact that the Charter was given by the Supreme Commander of the Allied Powers which fought the Pacific War, and that the members of the Tribunal and of the prosecution staff are representatives of the nations who were signatories to the Instrument of Surrender, together with representatives of two nations which participated in that war but were not signatories to the Instrument of Surrender because they had not, at that moment, achieved national independence.

"This restriction follows also from the above-mentioned Special Proclamation of the Supreme Commander, by which the Tribunal was constituted and which gives as one of the considerations on which the Charter is based:

> 'Whereas the United States and the Nations allied therewith, in opposing the illegal wars of aggression of the Axis Nations, have from time to time made declarations of their intentions that war criminals should be brought to justice.'

> "Never have the Allied Nations made any declaration about any war crimes other than those committed in the last of the wars ending with the destruction of Germany and the Surrender of Japan."

That this Tribunal was trying Petitioners for crimes which had never been declared to be such under the Constitution of the United States or pursuant to any international law or treaties is apparent from the statement made by the Chief Prosecutor regarding personal liability in his opening address:

> "The personal liability of these high-ranking civil officials is one of the most important, and perhaps the only new question under international law, to be presented to this Tribunal."

The admission that there is an absence of any international law to hold Petitioners personally responsible renders the entire judgment nugatory.

In the conduct of the trial itself, Petitioners were exposed to a relaxation of the rules of evidence and procedure such as has never been countenanced in any civilized national court in modern history. This was made possible by virtue of the Charter which was promulgated by General of the Army Douglas MacArthur under the direction of the Executive of the United States and military authorities. The International Military Tribunal for the Far East, in many instances by a majority opinion, admitted in evidence over objections and exceptions hundreds of documents consisting of *ex parte* affidavits, unsigned and unsworn statements, diary entries, newspaper reports, unofficial documents, hearsay statements of the second and third degrees, secondary evidence of the contents of the documents and unidentified reports. At one stage of the proceedings a long prosecution document stating the prosecution's version and interpretation of the contents of innumerable affidavits and reports was permitted to be introduced in evidence.

The Tribunal refused to call in witnesses at the request of the Petitioners, whose *ex parte* affidavits were admitted into evidence over objection and exception. The Tribunal on a number of occasions refused to call witnesses at the request of the Petitioners, who were reasonably expected to give testimony relevant and material to the defense of Petitioners. The Tribunal changed the rules of procedure after the prosecution had finished its case. The meaning of probative value which had been the test on the acceptance or rejection of the prosecution's documents was changed when the defense case commenced. As Mr. Justice PAL said:

> "I believe the view we took on the defense objection to prosecution evidence was preferable to that we subsequently took on the prosecution objection to the defense evidence."

Hundreds of documents offered by the defense which were of a similar nature to those offered by the prosecution, were rejected by the Tribunal, yet a very small number, perhaps less than twenty five of the documents of the prosecution were rejected. Many other instances of rulings resulting in prejudice could be related.

Other grounds supporting Petitioners' contention that these writs should be granted have not been briefed because of limitation of time. We invite the Court to examine and consider the companion petitions setting forth violations of Article 1, Section 9, Clause 8; Article 1, Section 8, Clause 14; Article 1, Section 9, Clause 3 and the Fifth and Sixth Amendments of the Constitution.

CONCLUSION

The relief requested by Petitioners in this and the companion petitions should be granted.

Dated, New York, December 14, 1948.

Respectfully submitted,

JOHN W. CRANDALL,
Attorney of Record for Petitioners.

WILLIAM LOGAN, JR.,
JOHN G. BRANNON,
GEORGE YAMAOKA,
GEORGE A. FURNESS,
HELEN F. TUOHY,
Of Counsel.

APPENDIX "A"

Authority of General MacArthur as Supreme Commander for the Allied Powers

September 6, 1945

The text of a message transmitted on September 6 through the Joint Chiefs of Staff to General MacArthur follows. It was prepared jointly by the Department of State, the War Department and the Navy Department and approved by the President on September 6. The message is a statement clarifying the authority which General MacArthur is to exercise in his position as Supreme Commander for the Allied Powers.

"1. The authority of the Emperor and the Japanese Government to rule the State is subordinate to you as Supreme Commander for the Allied Powers. You will exercise your authority as you deem proper to carry out your mission. Our relations with Japan do not rest on a contractual basis, but on an unconditional surrender. Since your authority is supreme, you will not entertain any question on the part of the Japanese as to its scope.

"2. Control of Japan shall be exercised through the Japanese Government to the extent that such an arrangement produces satisfactory results. This does not prejudice your right to act directly if required. You may enforce the orders issued by you by the employment of such measures as you deem necessary, including the use of force.

"3. The statement of intentions contained in the Potsdam Declaration will be given full effect. It will not be given effect, however, because we consider ourselves bound in a contractual relationship with Japan as a result of that document. It will be respected and given effect because the Potsdam Declaration forms a part of our policy stated in good faith with relation to Japan and with relation to peace and security in the Far East."

APPENDIX "B"

Agreement of Foreign Ministers at Moscow on Establishing Far Eastern Commission and Allied Council for Japan, December 27, 1945

The Foreign Ministers of the Union of Soviet Socialist Republics, the United Kingdom, and the United States of America met in Moscow from December 16 to December 26, 1945, in accordance with the decision of the Crimea Conference, confirmed at the Berlin Conference, that there should be periodic consultation between them. At the meeting of the three Foreign Ministers, discussions took place on an informal and exploratory basis and agreement was reached on . . .

. . . . . .

Far Eastern Commission and Allied Council for Japan

A. *Far Eastern Commission*

Agreement was reached, with the concurrence of China, for the establishment of a Far Eastern Commission to take the place of the Far Eastern Advisory Commission. The terms of Reference for the Far Eastern Commission are as follows:

1. Establishment of the Commission.

A Far Eastern Commission is hereby established composed of the representative of the Union of Soviet Socialist Republics, United Kingdom, United States, China, France, the Netherlands, Canada, Australia, New Zealand, India, and the Philippine Commonwealth.

II. FUNCTIONS

A. The functions of the Far Eastern Commission shall be:

1. To formulate the policies, principles, and standards in conformity with which the fulfillment by Japan of its obligations under the Terms of Surrender may be accomplished.

2. To review, on the request of any member, any directive issued to the Supreme Commander for the Allied Powers or any action taken by the Supreme Commander involving policy decisions within the jurisdiction of the Commission.

3. To consider such other matters as may be assigned to it by agreement among the participating Governments reached in accordance with the voting procedure provided for in Article V-2 hereunder.

B. The Commission shall not make recommendations with regard to the conduct of military operations nor with regard to territorial adjustments.

C. The Commission in its activities will proceed from the fact that there has been formed an Allied Council for Japan and will respect existing control machinery in Japan, including the chain of command from the United States Government to the Supreme Commander and the Supreme Commander's command of occupation forces.

III. FUNCTIONS OF THE UNITED STATES GOVERNMENT

1. The United States Government shall prepare directives in accordance with policy decisions of the Commission and shall transmit them to the Supreme Commander through the appropriate United States Government agency. The Supreme Commander shall

be charged with the implementation of the directives which express the policy decisions of the Commission.

2. If the Commission decides that any directive or action reviewed in accordance with Article II-A-2 should be modified its decision shall be regarded as a policy decision.

3. The United States Government may issue interim directives to the Supreme Commander pending action by the Commission whenever urgent matters arise not covered by policies already formulated by the Commission; provided that any directives dealing with fundamental changes in the Japanese constitutional structure or in the regime of control, or dealing with a change in the Japanese Government as a whole will be issued only following consultation and following the attainment of agreement in the Far Eastern Commission.

4. All Directives issued shall be filed with the Commission.

IV. Other Methods of Consultation

The establishment of the Commission shall not preclude the use of other methods of consultation on Far Eastern issues by the participating Governments.

V. Composition

1. The Far Eastern Commission shall consist of one representative of each of the States party to this agreement. The membership of the Commission may be increased by agreement among the participating Powers as conditions warrant by the addition of representatives of other United Nations in the Far East or having territories therein. The Commission shall

provide for full and adequate consultations, as occasion may require, with representatives of the United Nations not members of the Commission in regard to matters before the Commission which are of particular concern to such nations.

2. The Commission may take action by less than unanimous vote provided that action shall have the concurrence of at least a majority of all the representatives including the representatives of the four following Powers: United States, United Kingdom, Union of Soviet Socialist Republics and China.

VI. Location and Organization

1. The Far Eastern Commission shall have its headquarters in Washington. It may meet at other places as occasion requires, including Tokyo, if and when it deems it desirable to do so. It may make such arrangements through the Chairman as may be practicable for consultation with the Supreme Commander for the Allied Powers.

2. Each representative on the Commission may be accompanied by an appropriate staff comprising both civilian and military representation.

3. The Commission shall organize its secretariat, appoint such committees as may be deemed advisable, and otherwise perfect its organization and procedure.

VII. Termination

The Far Eastern Commission shall cease to function when a decision to that effect is taken by the concurrence of at least a majority of all the representatives including the representatives of the four following Powers: United States, United Kingdom, Union of Soviet Socialist Repub-

lics and China. Prior to the termination of its functions the Commission shall transfer to any interim or permanent security organization of which the participating governments are members those functions which may appropriately be transferred.

It was agreed that the Government of the United States on behalf of the four Powers should present the Terms of Reference to the other Governments specified in Article I and invite them to participate in the Commission on the revised basis.

B. *Allied Council for Japan*

The following agreement was also reached, with the concurrence of China, for the establishment of an Allied Council for Japan:

1. There shall be established an Allied Council with its seat in Tokyo under the chairmanship of the Supreme Commander for the Allied Powers (or his Deputy) for the purpose of consulting with and advising the Supreme Commander in regard to the implementation of the Terms of Surrender, the occupation and control of Japan, and of directives supplementary thereto; and for the purpose of exercising the control authority herein granted.

2. The membership of the Allied Council shall consist of the Supreme Commander (or his Deputy) who shall be Chairman and United States member; a Union of Soviet Socialist Republics member; a Chinese member; and a member representing jointly the United Kingdom, Australia, New Zealand and India.

3. Each member shall be entitled to have an appropriate staff consisting of military and civilian advisers.

4. The Allied Council shall meet not less often than once every two weeks.

5. The Supreme Commander shall issue all orders for the implementation of the Terms of Surrender, the occupation and control of Japan, and directives supplementary thereto. In all cases action will be carried out under and through the Supreme Commander who is the sole executive authority for the Allied Powers in Japan. He will consult and advise with the Council in advance of the issuance of orders on matters of substance, the exigencies of the situation permitting. His decisions upon these matters shall be controlling.

6. If, regarding the implementation of policy decisions of the Far Eastern Commission on questions concerning a change in the regime of control, fundamental changes in the Japanese constitutional structure, and a change in Japanese Government as a whole, a member of the Council disagrees with the Supreme Commander (or his Deputy), the Supreme Commander will withhold the issuance of orders on these questions pending agreement thereon in the Far Eastern Commission.

7. In cases of necessity the Supreme Commander may take decisions concerning the change of individual Ministers of the Japanese Government, or concerning the filling of vacancies created by the resignation of individual cabinet members, after appropriate preliminary consultation with the representatives of the other Allied Powers on the Allied Council.

APPENDIX "C"

Apprehension, Trial and Punishment of War Criminals in the Far East (FEC Policy Decision, April 3, 1946)

1. The term "war crimes" as used herein, includes:

a. Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements and assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

b. Violations of the laws or customs of war. Such violations shall include but not be limited to murder, ill treatment or deportation to slave labor or for any other purpose of civilian population of, or in, occupied territory, murder or ill treatment of prisoners of war or persons on the seas, or elsewhere improper treatment of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity.

c. Murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war or prosecutions on political, racial or religious grounds in execution of or in connection with any crime defined herein whether or not in violation of the domestic law of the country where perpetrated.

2. The offense need not have been committed after a particular date to render the responsible party or parties subject to arrest but, in general, should have been committed since, or in the period immediately preceding the Muk-

den incident of September 18, 1931. The preponderance of cases may be expected to relate to the years since the Lukouchiao incident of July 7, 1937.

3. All practicable measures should be taken to identify, investigate, apprehend, and detain all persons suspected of having committed war crimes, as defined in paragraph 1. above, and all persons whom any one of the United Nations or Italy charges with such crimes.

4. Suspected war criminals should be held in close confinement, without access to the press or other media of public information, and without distinction as to rank or position, as befits ordinary criminals.

5. The Supreme Commander for the Allied Powers should have:

(a) power to appoint special international military courts (which term should be held to include tribunals of any type) composed of military, naval, or air force officers or civilians representing any two or more of the states members of the Far Eastern Commission for the trial under any applicable law, domestic or international, including the laws and customs of war, of the Far Eastern war criminals indicted by the Governments of these states, and

(b) power to prescribe, subject to consultation with the representatives of those governments, rules of procedure for such courts. The Supreme Commander shall appoint to each international court a judge nominated by each state represented on the Far Eastern Commission which signifies its desire to participate in the work of such court. In the appointment of the international courts and in all trials before them the international character of the courts and of

the authority by which they were appointed and under which they act should be properly emphasized and recognized, particularly in dealings with the Japanese people. The Supreme Commander for the Allied Powers should have, (1) the responsibility for carrying out the judgments of any international courts appointed by him; and (2) the power to approve, reduce or otherwise alter any sentences imposed by any such courts, but not to increase the severity thereof, after consultation with the Allied Council for Japan and the Representatives in Japan of the other Powers, members of the Far Eastern Commission.

6. The Supreme Commander for the Allied Powers (a) should promptly establish an agency, acting under his command to investigate reports of war crimes, to collect and analyze evidence, to arrange for the apprehension and prompt trial of suspects, to prepare, supervise and conduct the prosecution of individuals and organizations before international military courts or tribunals, and to recommend to the Supreme Commander which individuals and organizations should be prosecuted, before what courts they should be tried and what persons should be secured as witnesses, and (b) should provide, after discussion with the local representatives of the nations involved, and in a manner consistent with efficient administration, for equitable inclusion in the membership of such agency of suitable representatives of the States members of the Far Eastern Commission. This agency should advise the Supreme Commander and other Military commanders for the Allies on matters relating to war criminals. This agency should attach importance to the investigation of the evidence that offenses of the type described in paragraph 1 a above have been committed, should collect and analyze the evidence of such offenses and should recommend to the Supreme Commander a plan as indicated in paragraph 5 above for the

appointment of an international court for the trial of such offenses and the charges to be preferred. This agency should also maintain a central record and information office of Japanese war criminals and war crimes, the records and files of which should be available to any interested United Nation.

7. The military command of any nation (including the United States) participating in the occupation of areas previously dominated by Japan may establish special national military courts to deal with war criminals not held or requested by the Supreme Commander for trial by an international military court or tribunal of the types referred to in paragraph 6 above. Such courts should be separate from courts which may be set up to deal with current offenses against the occupation or infractions of military discipline.

8. Military commanders of forces of occupation in the Far East should promptly comply with a request by the government of any one of the United Nations or Italy for the delivery to it of any person who is stated in such request to be charged with a war crime, subject to the following exceptions:

(1) Persons who have held high political, civil or military positions in the Japanese Empire or in one of its allies, co-belligerents or satellites, should not be delivered, pending decision whether such person should be tried before an international military court or tribunal. Suspected war criminals desired for trial before such a court or tribunal or persons desired as witnesses at such trials will not be turned over to the nation requesting them so long as their presence is desired in connection with such trials.

(2) Where persons are requested by more than one of the Governments above-mentioned for trial of a war crime, the military commanders concerned should make their determinations based on all circumstances, including the relative seriousness of the respective charges against such a person and the national interests involved, and should deliver the requested person to a particular United Nation or Italy accordingly.

9. Compliance with any request for the delivery of a suspected war criminal should not be delayed on the ground that other requests for the same person are anticipated.

10. Delivery of a suspected war criminal to a requesting government should be subject to the condition that if such person is not brought to trial, tried and convicted within six months from the date he is so delivered, he will be returned to the authority who made delivery if he has been requested for trial by any of the other United Nations or Italy.

11. Military commanders should take under their control, pending subsequent decisions as to its eventual disposition, property, real and personal, found in areas of their respective jurisdiction and owned or controlled by persons taken into custody pursuant to the provisions of paragraph 3 above.

12. Such measures as are deemed necessary should be taken to insure that witnesses to war crimes will be available when required.

13. The execution of death sentences should be deferred if there is reason to believe that the testimony of those convicted would be of value in the trial of other war criminals.

14. Any national of any United Nation who may be requested, or who there is reason to believe may be desired, by his government as a renegade or quisling, should be arrested. Such persons should normally be turned over as soon as practicable to their government.

15. Military commanders having custody of alleged offenders requested under paragraphs 8 and 14 above, if in doubt as to whether such persons should be turned over to the demanding nation for trial, should consult their government and, in appropriate cases, leave the matter to be dealt with through diplomatic channels. Within the main islands of Japan, the Supreme Commander for the Allied Powers will have custody of such alleged offenders and should consult the Joint Chiefs of Staff in cases of doubt.

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APPENDIX "D"

DRAFT

JOINT CHIEFS OF STAFF

Directive on the Identification, Apprehension and Trial of Persons Suspected of War Crimes

This directive is issued to you as Supreme Commander for the Allied Powers.

1. The term "war crimes" as used herein, includes:

A. Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

B. Violations of the laws or customs of war. Such violations shall include but not be limited to murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of, or in, occupied territory, murder or ill-treatment of prisoners of war or internees or persons on the seas or elsewhere, improper treatment of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity.

C. Murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war or persecutions on political, racial or religious grounds in execution of or in connection with any crime defined

herein whether or not in violation of the domestic law of the country where perpetrated.

2. The offense need not have been committed after a particular date to render the responsible party or parties subject to arrest, but in general, should have been committed since, or in the period immediately preceding the Mukden incident of September 18, 1931. The preponderance of cases may be expected to relate to the years since the Lukouchiao incident of July 7, 1937.

3. You will, in the areas subject to your jurisdiction, take all practicable measures to identify, investigate, apprehend and detain all persons whom you suspect of having committed war crimes as defined in paragraph 1, subparagraphs B and C above, and all persons whom any one of the United Nations or Italy notifies to you as being charged with such crimes. You will similarly apprehend and detain the persons deemed to be liable under paragraph 1.A. above, who are named in any list which may be sent to you by the United States National War Crimes Office and such other persons against whom you have probable cause for charging under paragraph 1.A. upon the basis of evidence available to you. In executing these tasks you will require from the Japanese such assistance as you deem necessary.

4. You will hold suspected war criminals in close confinement, without access to the press or other media of public information, and without distinction as to rank or position, as befits ordinary criminals.

5. As Supreme Commander for the Allied Powers, you have power (a) to appoint special international military courts (which term shall be held to mean tribunals of any kind), composed of military or naval officers or

civilians of two or more of the United Nations, for the trial, under any applicable law, domestic or international, including the laws and customs of war, of Far Eastern war criminals where the alleged offenders are, in the Supreme Commander's opinion, appropriately to be tried by an international court; and (b) to prescribe or approve rules of procedure for such tribunals. The appointment of any such international court will be discussed by the Supreme Commander or his designated representative in advance with the appropriate local officers or representatives of each nation to be represented upon such a court and fair arrangements will be made for appropriate representation of each such nation upon the Court. No such officer or civilian will be appointed to serve upon such a court without the approval of the local commander of the forces of his nation or such other official as any nation may prescribe to give such approval for its own nationals. In the appointment of any such international court and in all trials before it *the international character of the court and of the authority by which it is appointed should be properly recognized and emphasized, particularly in dealings with the Japanese people. Until further authorization by the Joint Chiefs of Staff, no international court for the trial of persons charged with offenses of the type described in paragraph 1.A. above will be established by the Supreme Commander.* In submitting any plan for the appointment of such a court, you should specify the particular offenses and alleged offenders to be tried before the court and the nature of the coordination of the plan effected by you on a military level with representatives of the nations to be represented upon the court.

6. You will have (a) the responsibility for carrying out the judgments of any international courts or tribunals and (b) the power to approve, reduce or otherwise alter

any sentence imposed by such a court or tribunal, but not to increase the severity thereof.

7. You may authorize the military command of any nation participating in the occupation of Japan, including the United States, to establish special military courts to deal with war criminals not held or requested by you for trial before an international court or tribunal. Such courts should be separate from courts which may be set up to deal with current offenses against the occupation or infractions of military discipline.

8. Subject to the provisions of paragraph 16, you will promptly comply with a request by the Government of any one of the United Nations or Italy for the delivery to it of any person who is stated in such request to be charged with a war crime, subject to the following exceptions:

(1) Persons who have held high political, civil or military positions in the Japanese Empire or in one of its allies, co-belligerents or satellites, will not be delivered, pending decision whether such persons should be tried before such tribunal, or persons desired as witnesses at trials before the tribunal, will not be turned over to the nation requesting them so long as their presence is desired in connection with such trials.

(2) Where persons are requested by more than one of the Governments above mentioned for trial of a war crime, you will make your own determination based on all the circumstances, including the relative seriousness of the respective charges against such a person and the national interests involved, and will deliver the requested person to a particular United Nation or Italy accordingly.

9. Compliance with any request for the delivery of a suspected war criminal should not be delayed on the ground that other requests for the same person are anticipated.

10. Delivery of a suspected war criminal to a requesting government shall be subject to the condition that if such person is not brought to trial, tried and convicted within six months from the date he is so delivered, he will be returned to you if requested for trial by any of the other United Nations or Italy.

11. You will take under your control, pending decision by higher authorities as to its eventual disposition, property, real and personal, found in areas subject to your jurisdiction and owned or controlled by persons taken into custody pursuant to the provisions of paragraph 3 above.

12. You will take such measures as you deem necessary to insure that witnesses to war crimes will be available when required.

13. The execution of death sentences should be deferred when you have reason to believe that the testimony of those convicted would be of value in the trial of other war criminals.

14. You will arrest any national of a United Nation who is requested, or whom you believe may be desired, by his government as a renegade or quisling. Subject to the provisions of paragraph 16, such persons should normally be turned over as soon as practicable to their government.

15. You should (a) promptly establish an agency, acting under your command, to investigate reports on war crimes and to collect and analyze evidence, to arrange for the apprehension and prompt trial of suspects, to prepare,

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SUPREME COURT U S

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 239 Misc.

KOKI HIROTA, *Petitioner*,

v.

GENERAL OF THE ARMIES DOUGLAS MACARTHUR, ET AL.

No. 240 Misc.

KENJI DOHIHARA, *Petitioner*,

v.

GENERAL OF THE ARMIES DOUGLAS MACARTHUR, ET AL.

No. 248 Misc.

KOICHI KIDO, TAKASUMI OKA, KENRYO SATO, SHIGETARO SHIMADA, and SHIGENORI TOGO, *Petitioners*

v.

GENERAL OF THE ARMIES DOUGLAS MACARTHUR, ET AL.

AMICUS CURIAE BRIEF OF THE NATIONAL LAWYERS GUILD ON PETITION FOR WRIT OF HABEAS CORPUS.

NATIONAL LAWYERS GUILD,
ROBERT J. SILBERSTEIN,
Executive Secretary.

SAMUEL H. JAFFE,
912 Dupont Circle Building
Washington, D. C.

MITCHELL FRANKLIN,
604 West 115th Street
New York, New York

JOSEPH H. CROWN,
521 Fifth Avenue
New York, New York
Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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AMICUS CURIAE BRIEF OF THE NATIONAL LAWYERS GUILD ON PETITION FOR WRIT OF HABEAS CORPUS.

The National Lawyers Guild is a national association of members of the Bar. Important among its objectives is that of promoting the rule of law in international relations, and strengthening the United Nations. Because it believes that intervention by this Court would violate agreements

of the co-equal Allied national states and impair the legal structure for the occupation of Japan, it has secured the consents of the parties to the filing of this brief as amicus curiae.

ARGUMENT.

Because the constitution of the International Military Tribunal for the Far East resulted from the legal acts of several co-equal national states, allied in war against the state of Japan, its proceedings and determinations should not be subject to unilateral judiciary review by the national courts of any of such co-equal allied States, including the Supreme Court of the United States. A decision by the Supreme Court of the United States to review the determinations of the International Military Tribunal for the Far East would, by violating the consensual acts of the co-equal Allied national states, impair the legal structure for the occupation of Japan, and imply to other Allied national states, that the United States, speaking through its Supreme Court, now regrets its agreements with its co-equal Allies, and in reviewing the proceedings and determinations of the Military Tribunal for the Far East is contravening the international agreements made with them.

The International Military Tribunal for the Far East was constituted an international tribunal in compliance with a Potsdam Declaration of July 26, 1945, which stated that "* * * stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners" (Activities of the Far Eastern Commission (1947), Dept. of State Publ. 2888, Far Eastern Series 24 (1947).)

This particular Potsdam Declaration was the legal act of the United States, China and Great Britain. The Yalta Agreement of February 11, 1945, which provided that the Union of Socialist Soviet Republics should in due course enter the war against Japan (Occupation of Japan, Department of State Publ. 2671, Far Eastern Series 52 [n.d.]) prepared the legal foundation for subsequent participation

by the Soviet Union in the international legal acts, such as this Potsdam Declaration and others, which justified the process against Japanese war criminals.

On August 14, 1945, President Truman announced that Japan had submitted to the Potsdam Declaration (*id.* 59); such submission was provided for in the Instrument of Surrender (*id.* 62), and presumably was "nationalized" under Japanese conceptions of international and constitutional law by an Imperial Rescript of September 2, 1945 (*id.* 64).

It is not necessary to discuss whether consensual legal relations were created with occupied Japan by such submission, because the international character of the International Military Tribunal for the Far East was established by the legal act *inter se* of the co-equal Allied states on December 27, 1945 at the time of the Moscow Meeting of Foreign Secretaries. This conference, which was held in consequence of the Potsdam Declaration and the Yalta Agreement, brought together the representatives of the United States, the Soviet Union and the United Kingdom. With the concurrence of China, they established Terms of Reference for the creation and functions of a Far Eastern Commission (FEC) (Far Eastern Series 24, at p. 36), in which eleven national states were to participate.

Article II. A. 1 of the Terms of Reference states that it is the function of the Far Eastern Commission—

> "To formulate the policies, principles and standards in conformity with which the fulfillment by Japan of its obligations under the Terms of Surrender may be accomplished,"

Article II. A. 2 gave the Far Eastern Commission the function—

> "To review on the request of any member any directive issued to the Supreme Commander for the Allied Powers or any action taken by the Supreme Commander involving policy decisions within the jurisdiction of the Commission."

Article III. 1 of the Terms of Reference stipulated that—

> "The United States Government shall prepare directives in accordance with policy decisions of the Commission and shall transmit them to the Supreme Commander through the appropriate United States Government agency. The Supreme Commander shall be charged with the implementation of the directives which express the policy decisions of the Commission."

Acting under the Terms of Reference, the preamble of FEC Policy Decision of June 19, 1947, (entitled Basic Post-Surrender Policy for Japan) declared:

> "*The nations composing this Commission,* with the object of fulfilling the intentions of the Potsdam Declaration * * * *are therefore agreed* * * * To complete the task of * * * stern justice to war criminals * * * ."

Article II. 1 of this Decision provided that—

> "The occupation shall have the character of an operation in behalf of the Powers that have participated in the war against Japan. The principle of participation in the occupation of Japan by forces of these nations is affirmed. The occupation forces will be under the command of a Supreme Commander designated by the United States."

Article III. 2 of this Decision declared that—

> "Stern justice shall be meted out to all war criminals * * * Persons charged by the Supreme Commander or appropriate United Nations agencies with being war criminals shall be arrested, tried and, if convicted, punished: Those wanted by another of the United Nations for offenses against its nationals shall * * * be turned over to the custody of such other nations."

Moreover, FEC Policy Decision of April 3, 1946 defined war crimes and authorized the Supreme Commander for the Allied Powers to appoint "special international courts". This Decision then stipulated—

> "*In the appointment of the international Courts* and *and in all trials before them, the international character of the courts and of the authority by which they were appointed and under which they act should be properly emphasized and recognized*, particularly in dealings with the Japanese people. The Supreme Commander for the Allied Powers should have (1) the responsibility for carrying out the judgments of any international courts appointed by him and (2) the power to approve, reduce or otherwise alter any sentence imposed by any such courts, but not to increase the severity thereof * * *." (Italics supplied)

This Decision also sharply differentiates national tribunals from international tribunals, stating that—

> "The military command of any nation (including the United States) participating in the occupation * * * may establish special national military courts to deal with war criminals not held or requested by the Supreme Commander for trial by an international military court or tribunal * * *."

The international character of the International Military Tribunal for the Far East was recognized in the Special Proclamation of the Supreme Commander of January 19, 1946, in which he declared—

> "Whereas, the Governments of the United States, Great Britain and Russia at the Moscow Conference, December 26, 1945, having considered the effectuation by Japan of the Terms of Surrender, with the concurrence of China have agreed that the Supreme Commander shall issue all orders for the implementation of the Terms of Surrender, Now, Therefore, I, * * * by virtue of the authority conferred upon me, in order to implement the Terms of Surrender, which requires the meting out of stern justice to war criminals * * *."

and established the International Military Tribunal for the Far East.

Article 17 of the Charter of the International Military Tribunal for the Far East, which dealt with review by

the Supreme Commander of the determinations of the Tribunal, does not recognize the possibility of further review of the international tribunal by national courts, such as the Supreme Court of the United States, it said:

> "The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action thereon. A sentence will be carried out in accordance with the order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence except to increase its severity." (Trial of Japanese War Criminals, Dept. of State Publication 2613, Far Eastern Series 12 (1946).

In recapitulation, the texts which have been examined establish that:

(1) The International Military Tribunal for the Far East is an international tribunal, representing co-equal allied national states.

(2) The jurisdiction of the International Military Tribunal for the Far East with respect to the convicted Japanese is exclusive and is subject solely to the review of the Supreme Commander for the Allied Powers.

(3) Unilateral assertion of jurisdiction by the Supreme Court of the United States or by any other national court would contravene international agreements entered into by the United States with other sovereign allied states in the Yalta Agreement, the Potsdam Declaration, the terms of reference with respect to the punishment of Japanese war criminals formulated at the Moscow Conference of Foreign Secretaries in December 1945, the policy decisions of the Far Eastern Commission and the Special Proclamation of the Supreme Commander for the Allied Powers.

CONCLUSION.

Full effect should be given to the international agreements in which allied nations have participated. The exercise of Jurisdiction by this Court would violate such agreements, and impair relations among the powers concerned. This Court is without Jurisdiction to grant the petition for a writ of habeus corpus prayed for by the Petitioners herein.

National Lawyers Guild,
Robert J. Silberstein,
Executive Secretary.

Samuel H. Jaffé,
912 Dupont Circle Building
Washington, D. C.

Mitchell Franklin,
604 West 115th Street
New York, New York

Joseph H. Crown,
521 Fifth Avenue
New York, New York
Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

Misc. Nos. 248 and 240

KENJI DOHIHARA and KOICHI KIDO, TAKASUMI OKA, KENRYO SATO, SHIGETARO SHIMADA and SHIGENORI TOGO, citizens and nationals of Japan, appearing by their attorney and next friend, William Logan, Jr.,

Petitioners,

vs.

1. General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers. 2. Lieut. General Walton H. Walker, individually and as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan. 3. James V. Forrestal, individually and as Secretary of National Defense of the United States, and 4. Kenneth C. Royall, individually and as Secretary, Department of the Army of the United States, and 5. General Omar H. Bradley, indiyidually and as Chief of Staff of the United States Army,

Defendants.

PETITION FOR REHEARING

John G. Brannon
Legal Section, G.H.Q.
SCAP -- A.P.O. 500
San Francisco, California
Attorney for Petitioners

SUPREME COURT OF THE UNITED STATES

Misc. Nos. 247 and 240

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Defendants.

PETITION FOR REHEARING

John G. Brannon
Legal Section, G.H.Q.
SCAP - A.P.O. 500
San Francisco, California
Attorney for Petitioners

Comes now petitioners above named and respectfully present this, their petition for rehearing of the above entitled causes, for the reasons hereinafter set forth.

I.

Petitioners recite that this Honorable Court in the above entitled proceedings has refused them permission for leave to file petitions for writs of habeas corpus. In refusing such permission this Court predicated its decision upon its finding that the tribunal in Tokyo, Japan, which sentences these petitioners, was not a tribunal of the United States. Because it was not a tribunal of the United States and because it was set up by General Douglas A. MacArthur as the agent of the Allied Powers, this Court decreed that the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgment and sentences so imposed upon these petitioners. The Court thereupon, for the reasons stated,

denied the motions of petitioners for leave to file petitions for writs of habeas corpus.

II.

Petitioners respectfully represent to this Honorable Court that the status, national or international, of the tribunal sentencing these petitioners is not concerned in this proceeding and that the Court has failed to consider, insofar as its brief ruling reveals, the all-important and vital issue involved. The vital question brought before this Court for determination is whether the Executive of the United States and the military authorities thereunder have exceeded their lawful authority or acted in contravention of the expressed terms of the Constitution of the United States in creating, or participating in the creation of, a classification of offenses under the Law of Nations designated as Crimes against Peace, which are the crimes with which these petitioners were charged and convicted.

III.

Whether or not the tribunal which sentenced these petitioners was in fact or theory a national or international tribunal is of no consequence whatsoever insofar as the question here propounded is concerned. It is the creation of the law used by and binding upon that tribunal to which our attention must be directed. If the American creation or participation in the creation of the offense of Crimes against Peace was illegal and in contravention of the Constitution of the United States, petitioners maintain that insofar as the United States is concerned their imprisonment is unlawful and illegal, giving birth to their right to petition this Court for the relief prayed for. (Ex Parte Quirin, 317 U.S. 1. In re Yamashita, 66 Sup. Ct. 340).

IV.

Petitioners respectfully represent that the Constitution of the United States, Article I, Section 8, Clause 10, thereof, delegates to the Congress of the United States alone the power to define Offenses against the Law of Nations insofar as the United States is concerned. This Court has heretofore announced that Congress and the President, like the courts, possess no power not derived from the Constitution (Ex-Parte Quirin, supra).

(2)

Congress did not define crimes against peace as an Offense

against the Law of Nations. The executive, acting through the military, did so define this offense. (Joint Chief of Staff Directive, Brief, p. 48). The utterances of the Executive, whether made alone or in conjunction with other nations, do not become part of the fundamental law of the United States. The fundamental law of the land is of three sources: (1) The Constitution, (2) the laws of the United States made in pursuance thereof, and (3) treaties. (Constitution of the United States, Article VI).

Executive agreements do not, therefore, rise to the dignity of the fundamental law of the land. And it follows clearly that, if even treaties are invalid if in violation of or inconsistent with the Constitution, Executive Agreements which clearly oppugn the express provisions of the Constitution must be subject to condemnation by this Court as unconstitutional and void. (See Brief - Page 22, 23).

V.

If the Executive action of the United States in creating or participating in the creation of Crimes against Peace, as an offense recognizable by the United States as a violation of the Law of Nations, is unconstitutional and void, it is not susceptible of good reasoning to maintain that the said Executive act becomes valid and legal when done in conjunction with other nations. The doing of an illegal act in collaboration with other nations does not and cannot deprive this Court of its right to examine the executive action from purely an American standpoint. This Court has the right and the power to direct its attention to the American action alone insofar as the creation of Crimes against Peace is concerned and to adjudge the legality or illegality thereof. If petitioners were charged with an offense created in violation of the Constituion of the United States what is to prevent this Court from so ruling and from ordering their release insofar as the United States is concerned? Such action as may be taken hereafter by the other Allied Nations is not within the province of this Court to discuss. But it is within the scope and purview of this Court to rule upon the American action and to signal the path to be followed in the future.

Petitioners, therefore, respectfully allege and maintain that it is only the action of the United States, as heretofore described, which is brought into issue by these motions for leave to file petitions for habeas corpus. Since this Court has not denied its original jurisdiction in habeas corpus, or has not announced the law concerning lower court

jurisdiction in habeas corpus where petitioners are outside the territorial limits of a Federal court, it is respectfully submitted that the matters herein set forth are subject to the keen consideration of this Court and that petitioners should and ought to be afforded the right and privilege of having their petitions for habeas corpus entertained and finally adjudicated upon the merits.

VI

WHEREFORE, the premises considered, petitioners pray that a rehearing be granted and that insofar as the United States is concerned, any action contemplated by the United States in carrying out or participating in the sentences imposed upon petitioners be stayed pending final adjudication of this petition.

John G. Brannon
Legal Section, G.H.Q.
SCAP -- A.P.O. 500
San Francisco, California
Attorney for petitioners

CERTIFICATE OF COUNSEL

I, John G. Brannon, an attorney and counsellor regularly admitted to practice in the Supreme Court of the United States, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that in my opinion said petition is well founded.

John G. Brannon